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Supreme Court of the United States

OCTOBER TERM, 1946

No. 162

HOMER GLEN WILCOX, *Petitioner,*

v.

LT. GEN. J. L. DEWITT, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

A. L. WIRIN,
Counsel for Petitioner.

ARTHUR GARFIELD HAYS,
OSMOND K. FRAENKEL,
NANETTE DEMBITZ,
MARION P. AMES,
WALTER GELLHORN,
Of the New York Bar,
Counsel for the National Office
AMERICAN CIVIL LIBERTIES UNION

A. L. WIRIN,
Counsel for the Southern California Branch
AMERICAN CIVIL LIBERTIES UNION

FRED OKRAND,
CHARLES A. HORSKY,
Of Counsel.

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INDEX.

CITATIONS

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OPINION BELOW.

Petitioner seeks review of a decision by the United States Circuit Court of Appeals for the Ninth Circuit in which that Court upheld the validity under the Constitution of the United States of an order issued by respondent prohibiting petitioner's presence in the State of his residence and in large areas of the United States, and likewise upheld the constitutionality of respondent's enforcement of his order by forcibly transporting petitioner out of his State of residence. The Circuit Court accordingly reversed the judgment (R. 304-305) rendered for the petitioner by the District Court of the United States for the Southern District of California. The opinion of the Circuit Court (R. 324-339) and the findings of fact and conclusions of law of the District Court (R. 215-303) are not reported.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered March 28, 1947 (R. 340). The issues of which review is here sought, as to the validity and constitutionality of respondent's order and action, were raised in the District Court, where they were decided in part in petitioner's favor, and in the Circuit Court where they were decided adversely to petitioner over his argument. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended.

QUESTIONS PRESENTED.

1. Whether respondent's exclusion order against petitioner, prohibiting his presence in his State of residence and in large areas of the United States, was authorized by Public Law 503 and Executive Order 9066 and was valid under the Constitution of the United States.

2. Whether respondent's forcible removal of petitioner from the State of California, as a method of enforcing the exclusion order against petitioner, was authorized by Executive Order 9066 and Public Law 503 and was valid under the Constitution of the United States.

3. Whether respondent is liable in damages for such forcible removal of petitioner.

CONSTITUTIONAL PROVISIONS, STATUTES, AND PUBLISHED ORDERS INVOLVED.

The Constitutional provisions here involved:

Article I, Section 1; Article I, Section 8; Article II, Section 2; and the Fifth Amendment,—are set forth in pertinent part in the Appendix, together with Executive Order 9066, issued February 19, 1942 (7 F. R. 1407) and Public

Law 503 (Act of March 21, 1942, c. 191, 56 STAT. 173, 8 U. S. C. Supp. III, 97a).

STATEMENT.

This action was commenced with the filing in the District Court of the United States for the Southern District of California of a complaint for damages, on the basis of respondent's issuance and enforcement of an order prohibiting petitioner's continued residence in the State of California or his presence in large areas of the United States (R. 2-11). The case was determined in the District Court (R. 215) upon motions for summary judgment (R. 26-27, 61-62) on the basis of the complaint (R. 2-11) and answer (R. 2-25), affidavits (R. 29-59, 62-82, 84-100, 110-112, 114-118, 159-165), answers to interrogatories (R. 102-109) and stipulated facts (R. 83). The facts are uncontroverted.

Petitioner was born in Ohio in 1887 and is a United States citizen by birth (R. 3). He had resided in the State of California for the ten years prior to his expulsion therefrom by the respondent on September 6, 1943 (R. 3). From May 1939 until his expulsion, petitioner's occupation had been that of "county bureau manager" of a voluntary organization entitled "Mankind United", which had as its announced purposes the elimination of "illiteracy, poverty and war" and the establishment of "economic equality based on the principles promulgated by Christ Jesus, including particularly the Golden Rule of Brotherly Love" (R. 9-10).

Issuance of Exclusion Order.

At some unspecified time prior to October 1942 respondent, who was the Commanding General of the Western Defense Command, had devised an Individual Civilian Exclusion procedure, which was applicable to all American citizens, other than those of Japanese descent, residing

within the eight states under his Command,[1] and under which respondent issued "Individual Exclusion Orders" prohibiting the subject's presence in his State of residence and in large areas of the United States. This procedure consisted of (1) collection by one of respondent's officers of "intelligence reports" as to the citizen from the Federal Bureau of Investigation and other investigative agencies of the Federal Government; (2) respondent's appointment of three of his officers as a Board to consider whether the citizen should be excluded and the Board's notification to the citizen that he could appear before it; (3) summarization of all information about the citizen and a recommendation as to his exclusion by the Board and by various other reviewing officers, with a final summarization and recommendation by the Assistant Chief of Staff of respondent's Civil Affairs Division, addressed to the respondent; and (4) respondent's issuance, if he considered it desirable, of an Individual Exclusion Order against the citizen (R. 238-240, 228-230).

On October 26, 1942, petitioner was served with a document stating that respondent had appointed a Board of officers to consider whether "military necessity" required the issuance of an order excluding petitioner from unspecified "Military Areas"; that he could, if he wished, appear before the Board of Officers on November 3, 1942; but that material in the hands of the Board would not be made available to him for his inspection (R. 231-233). Petitioner appeared before the Board and was informed merely that he could submit evidence as to his birthplace, citizenship, and

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[1] The Western Defense Command consisted of Washington, Oregon, California, Arizona, Montana, Idaho, Utah and Nevada (R. 216). Citizens of Japanese descent were evacuated en masse from the West Coast (*see* Korematsu v. United States, 323 U. S. 214), and aliens whose continued residence was deemed undesirable were interned under the alien enemy control program.

other such items of personal history, and as to the circumstances of his membership in Mankind United and the nature of his duties and activities as a Bureau Manager of the organization (R. 234). Petitioner submitted to interrogation of a general nature by the Board, but was confronted with no witnesses nor apprized in detail of the information against him in its possession (R. 16). The Board recommended that no order of exclusion issue against petitioner (R. 236); an additional intelligence memorandum was then addressed to the Board, but it nevertheless reaffirmed its conclusion (R. 237). The intelligence reports included in the file on petitioner contained statements by various informants as to the activities and speeches of petitioner and other leaders of "Mankind United" in connection with that organization.[2]

On December 28, 1942, respondent issued an Individual Exclusion order against petitioner, which stated as its grounds only "that the present action is dictated by military necessity", and prohibited him after the expiration of ten days from being in the States of California, Washington, Arizona, Oregon, and numerous other States (R. 240-241).

The exclusion order was served upon petitioner on January 22, 1943, accompanied by a notice by respondent that its execution was stayed because of a pending criminal proceeding against petitioner (R. 243-246); respondent likewise thereafter served such a notice with respect to the pendency of the proceeding commenced by petitioner in the

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[2] These reports are contained in the second volume of the record filed in the Ninth Circuit Court of Appeals in the case of *Wilcox v. DeWitt*, Case No. 10650; this record was incorporated by reference as part of the record in the instant proceeding (R. 314). The volume containing the reports will herein be designated as "R. II", and the first volume of the record filed in Case No. 10650 as "R. I."

United States District Court for the Southern District of California to enjoin enforcement of the exclusion order (R. 254-255).

Forcible Expulsion and Return.

Immediately upon the denial of the injunction by the District Court, and in fact even before the petitioner or his attorney had received word of the determination of the court (R. 267), respondent moved to enforce the exclusion order. On September 6, 1943, a military party acting under respondent's direction broke into petitioner's home and physically seized him and removed him to the State of Nevada (R. 267-268).

Upon the filing of the District Court's findings and judgment in November 1943 (R. 270), petitioner's attorney filed a notice of appeal therefrom (R. 285). Within the same month officers of the Western Defense Command re-considered whether petitioner's exclusion was desirable (R. 285-286). Thereafter, on January 15, 1944, the Commanding General[3] suspended the exclusion order against petitioner and advised him that he could return to the State of California (R. 286-287). Petitioner thereupon returned to San Diego and has continued to reside there. On March 22, 1944, the exclusion order was finally rescinded (R. 287); and in August, 1944, upon respondent's motion, petitioner's appeal from the District Court's denial of the injunction was dismissed as moot (R. 287-289).

Opinion of the District Court.

The District Court concluded that all issues as to the validity of the exclusion order were res judicata by virtue of the District Court judgment in the injunction suit, and that the only question for determination in the instant ac-

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[3] Respondent had been succeeded as Commanding General by Lt. Gen. Emmons in September, 1943 (R. 269).

tion was the legality of respondent's forcible physical enforcement of the order (R. 298). As to this issue the Court held that Public Law 503 was the only method that had been intended for enforcement of the exclusion order (R. 299).

Opinion of the Circuit Court.

The Circuit Court concluded, in reversing the District Court's judgment for petitioner, that forcible expulsion as a means of enforcing the exclusion order was authorized by Executive Order 9066 and Public Law 503. This conclusion rested in part on the view that criminal prosecution might not have been a sufficient sanction for the exclusion orders issued under the Executive Order and statute, particularly since one such order directed the mass exclusion of some one hundred thousand persons of Japanese descent. The Circuit Court also supported its conclusion as to authorization by the statement of one of the Congressional proponents of Public Law 503 and by this Court's language in *Korematsu v. United States*, 323 U. S. 214 (R. 325-332).

As to the justification for the order against petitioner and for its enforcement, the Court, quoting some of the intelligence reports (R. 332-335) and the opinion of the Assistant Chief of Staff of respondent's intelligence division (R. 335) stated that there was " 'reasonable ground' " for respondent's belief that petitioner's activity " 'might instigate others to carry out activities which would facilitate the commission of espionage and sabotage and encourage them to oppose measures taken for the military security' " (R. 337-338). It held, therefore, that there was a rational factual basis for the exclusion order against petitioner and for its enforcement (R. 338).[4]

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[4] The Circuit Court did not consider the arguments as to whether the validity of the order was res judicata (R. 338).

As to the validity of the issuance and enforcement of the order without a hearing other than that before the Board of Officers, the Circuit Court held that the procedure used was not violative of due process of law; it rested this conclusion on the basis that petitioner's exclusion was within respondent's "military discretionary powers", and on the basis that the exclusion of over seventy thousand American citizens of Japanese descent was upheld in the *Korematsu* case although no hearings were accorded to them (R. 338-339).

REASONS FOR GRANTING WRIT.

This case involves highly significant Constitutional issues as to the limits of the war power of the United States in relation to the control by military officers of the personal liberties of civilian citizens. These issues have not heretofore been presented for this Court's determination, and were decided by the Circuit Court on the basis, in part, of interpretations of this Court's decisions, which we maintain are erroneous.

In *Hirabayashi v. United States,* 320 U. S. 81, and *Korematsu v. United States,* 323 U. S. 214, this Court upheld measures adopted pursuant to the Executive Order and statute under which the respondent's order against petitioner was issued. While the Circuit Court relied on both of these decisions, they in fact control only minor aspects of the instant case, and the differences between the issues there involved and those here in question highlight the importance of the grant of the instant petition. In both the *Hirabayashi* and *Korematsu* cases, the measures in question were taken at a time when there was a reasonable basis for concluding that invasion of the United States was imminent, and the measures were in large part supported on that ground. In each case the measure was taken against a group of persons on a mass basis and was upheld on the

ground that action against the group as a whole was justified because there was a reasonable basis for apprehending disloyalty from some of its members, because of the difficulty of distinguishing the potentially disloyal, and because the danger of imminent invasion justified the failure to attempt to so distinguish. And in each case the order was enforced through civil process, that is, through criminal prosecution.

The instant case poses entirely different but equally important issues. Here an order drastically affecting the liberty of an individual citizen was issued on the ground of the supposed potential disloyalty of that individual. Though it was issued and enforced at a time when no invasion was imminent, no semblance of the procedure generally guaranteed by due process of law in the issuance of such an order was accorded either before or after its issuance. The Circuit Court's reference to the fact that in the *Korematsu* case the exclusion of over seventy thousand citizens was upheld though they received no hearing is not persuasive as to the validity of the order against petitioner, for this reasoning ignores the clear distinction drawn by this Court between the due process requirement for the issuance of a quasi-judicial order, such as that here involved, and of a legislative order. This Court has fully recognized that the war power, like the other powers of the Federal Government, is limited by the due process clause. Thus, while we concede, and, in fact, assert, the flexibility intrinsic in the standard of due process of law, we respectfully urge that this Court determine whether the procedure used in the issuance of the order against petitioner complied with this standard.

Respondent's enforcement of his order against petitioner by using troops physically and forcibly to remove petitioner is an unprecedented measure. No such military act against a civilian citizen has previously been in issue before this

Court, and the only acts of even a comparable nature in the history of this country have been taken pursuant to declarations of martial law. But it seems apparent that the circumstances existing at the time of petitioner's removal were far from those justifying martial law under the decisions of this Court. In upholding General DeWitt's act the Circuit Court relied in part on a dictum of this Court in *Korematsu v. United States;* that "the power to exclude includes the power to do it by force if necessary." We believe that the full implications of this dictum should be considered by this Court and that such dictum should not be permitted to countenance the exercise of such a drastic power as that here involved without this Court's careful consideration.

Even assuming the Circuit Court was correct in its holdings as to the constitutionality of the procedure adopted by the respondent in issuing the order and of his method of enforcement, the case presents the important issue of whether the circumstances as to petitioner were such as to warrant the exercise of these extraordinary powers. As to these circumstances, the Circuit Court appears to have accepted bits of information in the intelligence reports respecting petitioner's statements without any consideration of the context or true import of such statements, and to have accepted without question the opinion of one of respondent's officers as to petitioner's dangerous character. We do not believe the question of the constitutionality of respondent's action in the light of the facts pertaining to petitioner has received adequate judicial review.

Review of the instant decision is essential to the completion of this Court's consideration of the primary constitutional issues arising from the military control over the personal liberties of civilian citizens during World War II, other aspects of which were considered in the *Hirabayashi*

and *Korematsu* cases and in the martial law cases: *Duncan v. Kahanamoku* and *White v. Steer*, 327 U. S. 304.

The danger of arbitrary Executive action is greatest when war or other emergency causes uncritical acquiescence in official determinations purportedly rooted in the emergency. It is essential therefore for this Court to reaffirm in the instant case the principle that an allegation of "military necessity" will be subjected to searching judicial scrutiny.

ARGUMENT.

I

THE EXCLUSION ORDER PROHIBITING PETITIONER'S PRESENCE IN HIS STATE OF RESIDENCE AND IN LARGE AREAS OF THE UNITED STATES WAS UNCONSTITUTIONAL, AND WAS UNAUTHORIZED BY EXECUTIVE ORDER 9066 AND PUBLIC LAW 503.

We shall consider the unconstitutionality of the exclusion order before considering its lack of authorization because the argument on the latter point rests in large part on the former.

A. THE PROCEDURE FOLLOWED IN THE ISSUANCE OF THE EXCLUSION ORDER VIOLATED DUE PROCESS OF LAW WITHIN THE MEANING OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

It is unarguable that the information upon which the exclusion order was based consisted largely of "Intelligence" reports which embodied in many instances second and even third-hand versions of incidents and statements even though more reliable information about them was easily available; that the Intelligence reports also contained excerpts from various documents without information as to the context of such excerpts although the original documents were easily available; and that the purported basis for the summaries and opinions of the various Army officers included in the file were these same Intelligence reports, and the reliability

of the former therefore depended on the extent to which they were supported by the latter and the accuracy of the latter (R. II, 340-343; see contents of R. II, discussed in greater detail below).

Further, petitioner not only could not cross-examine those who had given the information against him, but could not even attempt otherwise to refute the bulk of it because it was not disclosed to him. (See Finding of District Court, R. 242-243.) Petitioner's appearance before the Board of Officers did not, and was not intended to, give him an opportunity to refute the adverse information in the Administrative file; the order was not intended to be, and was not in fact, based on the remarks and statements made before the Board. In fact, the order was based in part on reports submitted subsequent to the Hearing Board appearance (R. 239-240, 237, 17; R. II, 352; R. I, 159-160, 280-281, 268-269). Respondent at all times maintained that petitioner's appearance was merely a courtesy which the Army was not required to accord, and that respondent could consider any information it chose, whether or not it had been mentioned by the Board or was even included in the file. (See Findings of District Court, R. 292-295.)

We shall briefly exemplify some of the effects of the procedure used herein, and then consider whether there was any justification for the drastic departure made by respondent from the types of procedure generally deemed to be due process of law.

Nature of reports and summaries.

The Circuit Court's opinion repeats, as did the respondent's brief in that Court, a quotation in an FBI report of three sentences from a Mankind United statement which apparently was in the hands of the FBI, to the effect that the war could have been stopped if Mankind United members had "bestirred" themselves (R. 333). What the rest

of the bulletin would have disclosed as to the meaning of this ambiguous passage can only be conjectured; but some hint is supplied by another report to a similar effect. This report, which by chance, allows for a comparison between the facts and the summarization of them, indicates the delusive and prejudicial impression that could be conveyed as a result of the expurgation and summarization characteristic of the Intelligence reports. Thus, a report from the Office of the Assistant Chief of Staff G-2 "calls attention to the first paragraph (of a Mankind United letter) which expresses the organization's plan for rendering useless all implements of war" (R. II, 619, also quoted in Circuit Court opinion, R. 333). A reading of the letter itself, however, discloses that the sinister "plan" was "to build a world without Classes, Creeds, Wars or Poverty—for the Brotherhood of Man is the only hope of Peace and Security offered to a suffering, impoverished, bewildered humanity" (R. II, 622).

The distorted impression given by the summaries is also illustrated by one which states that petitioner had bought an electromatic typewriter which "can be converted into a radio transmitter and receiver" (R. II, 564). While the accompanying report gives no indication whatsoever that petitioner had purchased the equipment necessary for the conversion, and while it states that information on this point could be easily acquired, no attempt to ascertain the truth was made. Nevertheless, the suspicion aroused by the summary is in no way counteracted. Similarly, one of the reports emphasized that petitioner counseled members of Mankind United to evade Selective Service; a full statement of Mankind United's position on this question, however, showed that it was that members should request "deferment on the basis that they are ministers and students of a religious sect" (R. II, 343), a lawful viewpoint to urge even if one that was unwelcome to the military.

Since petitioner was not given an opportunity to explain most of the information in the file, the extent of its other inaccuracies can only be inferred from these examples and by the use of the customary criteria of credibility. The reports include scraps of information from all types of sources, without any attempt at a check on reliability or at corroboration of their truth. Thus one report relates that the FBI agent was told by an unnamed informant that the unnamed informant had been told by a minister that various statements had been made at a Mankind United meeting (R. II, 420). The minister, incidentally, had attended because some of his parishioners had begun to attend the meetings, and he appears to have disapproved of their attendance (R. II, 420-421). The meeting was a public one, as to which first-hand information was obviously available. As to the source of information, the reports contain no statements, except in the case of the minister and one or two other instances, as to the interests and connections of the various informants; as to whether, for example, an informant was being paid for investigation of Mankind United, so that it might well be to his interest to represent it as dangerous in order to encourage continuance of the investigation.

The most significant summary in the file is that of the Assistant Chief of Staff of the Civil Affairs Division. The final step in the exclusion procedure prior to the issuance of the order by General DeWitt was the recommendation to the General by the Assistant Chief of Staff of the Civil Affairs Division, accompanied by the latter's summary of the file. In this case, the recommendation was that the Hearing Board's recommendation against exclusion be disapproved and that the exclusion order issue. The bulk of the accompanying summary is a long quotation from the indictment of members of Mankind United, though no trial had then been held on the indictment. Also conspicuous in

the summary is the statement "that a very reliable informant reported that members of 'Mankind United' are 'possibly being schooled in methods of sabotage' " (R. II, 344). However, there is not one iota of information, except for the unidentified informant's unexplained viewpoint, as to any such schooling, and on the contrary there are frequent statements in the reports themselves as to Mankind United's opposition to violence and law-breaking of all types (R. II, 580, 591).

Indeed, the concluding reviews and summaries are replete with wild and unfounded "cloak and dagger" scare sentiments. Thus, the memorandum to the Assistant Chief of Staff of the Civil Affairs Division from the Assistant Chief of Staff, G-2, states without any attempt to support the statement on the basis of information or analysis, or consideration of Mankind United's religious and non-violent doctrines, that because of its opposition to the war its members "undoubtedly would commit acts of sabotage if directed to do so" (R. II, 414). He also states that enemy agents "are believed to be using members as collectors of military information" (R. II, 414). The latter statement seems to be a purposely vague and cryptic method of communicating a wholly unfounded dramatized view of the writer of the memorandum, for there is again no iota of supporting fact or opinion for it.[5] As to the importance of the summaries, even when a close analysis of the reports would have disclosed that the summaries exaggerated the information contained therein, it is clear that the summaries would be of influence upon the mind of a busy reviewer of the file.

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[5] The somewhat loose reference by Army officers to commission of espionage and sabotage without careful attention to accuracy was also notable in the testimony in the District Court in the injunction case (R. I, 191, 200-205).

It is to be noted, in conclusion, that respondent's procedure was so contrived as to obstruct any attack on his judgment as arbitrary and so as to shield his conclusions from scrutiny. Not only was the information on which he relied not disclosed to petitioner, but he made no findings indicating his basis for action, except that petitioner's exclusion was due to "military necessity". The standards, if any, used to determine whether exclusion was necessary (R. I. 231-232; see Findings of District Court, R. 293-294), and even the total number of exclusion orders (R. I. 258) were, for unknown reasons, kept a "military secret", thus impeding a scrutiny of respondent's acts.

NON-CONFORMITY WITH DUE PROCESS.

It seems clear that the exclusion order against petitioner was the type of order which must generally be based upon a quasi-judicial procedure; it affected an individual insofar as his constitutional rights were concerned and its substantive contitutionality depended on its basis in facts pertaining to that individual.[6] Obviously it could hardly be contended that all citizens living within the Western Defense Command lived there as a matter of military grace and privilege which the military could revoke whenever it so desired with or without a reasonable basis. Residing and earning a livelihood in a place of one's choice is a part of the constitutional right to life, liberty, and property, which can only be taken away by due process of law.[7] And the

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[6] Compare Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U. S. 88, 93-94; Morgan v. United States, 298 U. S. 486, 480; Southern R. R. Co. v. Commonwealth of Virginia, 290 U. S. 190, 195; Commission of California v. Pacific Gas and Electric Co., 302 U. S. 388, 392-393; Shields v. Utah Idaho R. R. Co., 305 U. S. 177, 182.

[7] Allgeyer v. Louisiana, 165 U. S. 578, 589; Adams v. Tanner, 244 U. S. 590, 596; Meyers v. Nebraska, 262 U. S. 390, 399.

fact that it was a military officer who issued the order against petitioner cannot seriously be deemed to remove either the substantive or the concomitant procedural protection of due process. For in the Army's apparent theory that its *ipse dixit* as to military necessity was sufficient, it appears to have ignored the fact that it was, in making the exclusion order, exercising power over civilians delegated to it by Congress as an administrative agency, rather than directing combat operations on the field of battle.[8] That the respondent must function within constitutional limits when serving in the former role was so clearly established in the *Hirabayashi* and *Korematsu* cases that it does not seem necessary to dilate on this question at this point. And see *Duncan v. Kahanamoku*, 327 U. S. 304; Ex parte *Quirin*, 317 U. S. 1, 19; *Sterling v. Constantin*, 287 U. S. 378, 402. And the fact that the order was issued as an exercise of the war power does not of course permit a disregard of due process. See *Major General W. W. Eagles v. Samuels*, and *Major General W. W. Eagles v. Horowitz*, 91 Law. Ed. 252, 260, involving the issuance of orders under the Selective Service Act, a highly important exercise of the war power.

Thus, we are brought to a consideration of respondent's declaration that the procedure he used accorded the greatest measure of due process commensurate with the discharge of his duties (R. 108).

The major argument which seemingly could be advanced as justification for this position is that the danger to be

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[8] It may be observed that the exclusion order was issued mainly upon the basis of the work of the FBI, a civilian agency, and that the choice of the military as the agency empowered to issue exclusion orders resulted from the happenstance that the Attorney General had declined to accept authority for mass evacuation of persons of Japanese ancestry (DeWitt Final Report, Japanese Evacuation from the West Coast (Govt. Pr. Off. 1943), pp. 6-7), rather than from a deliberate choice of the military as the proper agency to issue individual exclusion orders.

apprehended from the residence in the Western Defense Command of citizens who might commit espionage or sabotage was so great that it was justifiable to order their exclusion even though all the information on which the estimate of the citizen was based could not be disclosed because of confidential sources. But we are not contending that the order would be invalid unless all sources of information were revealed. The flexibility in procedure permitted under the standard of due process of law, well exemplified in the Selective Service procedure (see *Eagles* cases, *supra*) also permits of the use of confidential informants where this is essential.[9] We do maintain, however, that the justification for non-disclosure of some sources of information does not justify the complete abandonment of any attempt to apprise the petitioner of the information against him or to act on a disclosed basis.

Obviously, for example, the necessity for concealment of the names of some informants cannot serve as a justification for refusing to reveal to petitioner, so that he could present a refutation for the respondent's consideration, the information subsequently presented in the District Court. Nor could withholding from petitioner the knowledge that the information held against him included excerpts from publications and public speeches possibly be justified on grounds of confidential sources.

The danger of accepting the military's *ipse dixit* as to the military necessity for concealment is neatly illustrated in the instant case. The respondent had deleted some items from the administrative file prior to its introduction in evidence in the District Court, stating, without specification,

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[9] *See* Loh Wah Suey v. Backus, 225 U. S. 460; Kwock Jan Fat v. White, 253 U. S. 454, 459. *But see* Chew Hoy Quong v. White 249 Fed. 869 (C. C. A. 9, 1918). Compare *In re* Quarles and Butler, 158 U. S. 532; Vogel v. Grauz, 110 U. S. 311; Segurola v. United States, 16 F. (2d) 563 (C. C. A. 1st, 1926).

that these deletions were necessary for "security" in order to guard investigative sources. It was revealed at the trial, however, that one of the deletions was of a paragraph favorable to the petitioner which was totally unconnected with any such security interest (R. I, 166). Another mysterious and obviously unjustified deletion noted in the file is of the entire synopsis of one report dealing with a Mankind United meeting (R. II, 464) though all the other reports commence with a synopsis. Since the report states that most of the remarks at the meeting were "metaphysical" and not comprehended by the members, it would seem likely that the synopsis also was favorable to petitioner, and that it was thought that the favorable inferences of the report itself would not be noted if no synopsis appeared. Even as to the revelation of the identity of confidential informants, the Army's most hush-hush point, it is to be noted that the Army did not object to such revelation in the criminal trial involving petitioner (R. I, 171-172), since the military were not there free to devise the procedure.[10]

The only other argument which might be urged as justification for abandonment of procedural safeguards is that time did not permit of their observance. Such a contention has no factual support; its most obvious refutation is the fact that a quasi-judicial hearing could have been held in place of petitioner's appearance before the Hearing Board. This is not a situation such as that which prevailed in regard to the issuance of the mass evacuation orders against

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[10] In re *Grove*, 180 Fed. 62 (C. C. A. 3d, 1910), is an interesting instance from the World War I period of the apparent misuse of the cloak of "security" interests. There the Secretary of Navy refused to produce certain documents on the plea that this would be detrimental to the interests of the United States, but thereafter conceded that introduction of the copies of the same documents by another party would not "cause the discovery of military or other secrets detrimental to the public interests."

persons of Japanese ancestry. Here the investigation of the subject of each order continued sporadically for months prior to its issuance while he was kept under surveillance; and the file was passed from hand to hand for review before issuance of the order. (See in particular R. I, 255-256.) The disregard of due process was, we believe, not due to any evaluation of necessity for such disregard, but was instead due to the concept that the military was not bound by this constitutional requirement. Even assuming that the respondent had reason to believe it might be desirable on some occasion to issue an order so quickly that notice and hearing could not be allowed, a procedure should have been devised, permitting inspection of the file or a similar step (again compare Selective Service procedure), that would have accorded the subject a more adequate opportunity for defense than that here afforded. In any event, in petitioner's case no justification existed, from the standpoint of timing, for the procedure here used.

And even if there was justification for issuance of exclusion orders without a preceding quasi-judicial procedure, then the applicable principle would be that due process must be satisfied by a judicial hearing as to the basis of the order in proceedings for its enforcement.[11] By this type of procedure the administrator can issue orders without temporal restriction and have the benefit of immediate compliance insofar as it is voluntary, but the subject of the order is accorded a hearing if he challenges it. Under this principle, however, respondent's enforcement of the order by physical forcible expulsion of petitioner, rather than by criminal prosecution, was invalid (See *infra*, Point II).

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[11] *See* Bourjois v. Chapman, 301 U. S. 183, 189; Phillips v. Commissioner, 283 U. S. 589, 597; Bragg v. Weaver, 251 U. S. 57, 59; North American Cold Storage Co. v. Chicago, 211 U. S. 306.

B. NO REASONABLE FACTUAL BASIS FOR THE EXCLUSION ORDER AS A MEASURE FOR THE PREVENTION OF ESPIONAGE AND SABOTAGE HAS BEEN ESTABLISHED, AND ITS ISSUANCE WAS THEREFORE UNCONSTITUTIONAL.

As we believe is demonstrated in the preceding discussion, practically none of the data as to petitioner in the Administrative file could reasonably be relied upon as the basis for conclusions about petitioner, in view of the fact that such data was not submitted to petitioner for possible refutation nor even submitted to a reasonable and fair check through investigative methods. However, for the purposes of argument, we shall ignore this blanket objection to the reasonableness of the exclusion order, and consider the items of information upon which respondent appears to rely. Under the *Hirabayashi* opinion, the order is invalid unless the circumstances "afforded a rational basis" for the order and unless "in the light of all the facts and circumstances there was [a] substantial basis for the conclusion * * * that [the order] was a protective measure necessary to meet the threat of sabotage and espionage which would substantially affect the war effort." *Hirabayashi v. United States*, 320 U. S. 81, 91.

We commence with the information as to petitioner quoted in the Circuit Court's opinion, as well as in respondent's brief in that Court, which may be assumed to be the most persuasive to be found in support of the order.

Mankind United's statement as to workers bestirring "themselves in their own behalf" (R. 333), while rather meaningless out of context, no doubt referred to the same type of religious bestirring as did other Mankind United exhortations (R. II, 622); for if any action other than religious had been advocated in this statement, it is obvious that the quoted excerpt would have included such advocacy. The following two quotations in the Circuit Court's opinion (R. 333, 334) would seem to weaken, rather than strengthen, respondent's case; for they demonstrate how abstract and

far-fetched were Mankind United's views and how far they were removed from advocacy of espionage and sabotage. It is clear from these quotations alone, and is further demonstrated by the remainder of the file (discussed *infra*) that Mankind United functioned in an entirely different sphere from that of concrete and tangible enemy action.

The final point of reliance in the opinion (R. 335), the quoted view of the Assistant Chief of Staff, G-2, can hardly be given any great weight. As in the memorandum of the same officer referred to above (p. 15), the statement as to sabotage is added as a concluding fillip without any support whatsoever for it. And it is to be noted that this officer carefully refrains from an affirmative statement that the leaders might attempt to persuade the members to commit sabotage. As to the criticism by Mankind United of the dimout regulations, etc., referred to in this memorandum and in other summaries, it is to be noted that Mankind United never advised disobedience to these regulations, and that it was not the Army's function to suppress such criticism, which petitioner had a right to voice along with the rest of American citizens, by its exclusion procedure.

The impression as to the unlikelihood of sabotage or espionage by Mankind United, which we believe is conveyed even by the items emphasized in the Circuit Court's opinion, is borne out by the record as a whole. Mankind United was an organization which preached, in the main, fanciful doctrines of a semi-religious and pacifist nature. For the most part the speeches at its meetings consisted on the one hand of attempts to raise money and, on the other, of statements on social change with such vague and metaphysical social proposals that they seemed beyond the members' comprehension (R. II, 508-528, 473, 477, 478). To a minor extent, there was protest about the then-current or proposed civilian restrictions, such as dim-out and rationing (R. II, 547), and occasional references to fantastic methods

of abolishing warfare such as those mentioned in the opinion. One of Mankind United's major "Plans" for abolishing warfare was to create a Brotherhood of Man; to the extent that it spoke at all in physical terms, it was, instead of using espionage and sabotage, basing its hopes for ending the war on "death rays" (R. II, 415, 424) and a force to disintegrate mountains (R. II, 606). To breach of the laws or to violence, it was at all times opposed (R. II, 591).

Perhaps the most important aspect of Mankind United's vague pacifist preaching, which conclusively shows that espionage or sabotage on the part of its members could not reasonably be apprehended, is the fact that none of the information in the file indicates that Mankind United had any sympathy with the enemy or interest in American defeat (see Findings of Hearing Board, R. II, 347-348, 353).[12]

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[12] The Board of Officers before which petitioner appeared made the following findings:

> "That this organization (Mankind United) is religious in character, and he (petitioner), as the manager of the local branch, is in what might be termed a 'religious racket'. The Board is convinced from the testimony that he is a 'religious hypocrite' using his organization as a means of extracting money from the unwary and credulous, under the guise of religion.
>
> "That he has no connections, contacts or communication with any person known to be subversive, or having subversive tendencies.
>
> "That he was diffident, vague and indefinite in the manner in which he gave his testimony in answer to many questions propounded by the Board, and this was undoubtedly based upon a fear that he might be prosecuted for his so-called 'religious activities'.
>
> "That the file contained no information that he ever taught, preached or spoke against the best interests of the United

Rather, Mankind United was concerned with the Utopian goal of stopping violence and warfare as a whole on the part of all belligerents simultaneously. Interference with American defense facilities would not even have been consistent with its goals.

Besides the facts as to petitioner, the facts as to the military situation at the time of the order must likewise receive consideration in evaluating its reasonableness. It is clear that there was not at that time any danger of invasion (R. 227, 272). Certainly, in view of the improved military situation (as compared to that in the early months of the war[13]) any danger that might have been reasonably appre-

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States, or that he ever advised any of the 'members' of his organization to violate the Selective Service Act.

"That he is erratic and egotistical, and can very well be termed a 'crack-pot'."

After the Board's recommendation that petitioner not be excluded, and after the submission to it of an additional intelligence memorandum, it found:

"The Board has carefully considered this memorandum. It has reconsidered the entire file and the evidence adduced at the original hearing, and it is still of the same opinion that no exclusion order should be issued in this case. And, the Board still feels that Wilcox is a harmless 'crack-pot' interested in this organization purely for financial reasons."

And the Board of Review which reconsidered petitioner's case in November, 1943, and recommended that the exclusion order be suspended, stated:

"* * * it is the opinion of this Board that because of lack of anything to indicate a connection between Wilcox and agents of foreign governments, there is no more likelihood of his engaging in acts hostile to the war effort on the West Coast than in any other part of the country". (R. 285-286.)

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[13] As to the danger of invasion at that time, see Hirabayashi v. United States, at p. 91; Korematsu v. United States, at p. 216.

hended from petitioner was insufficient to warrant his exclusion, even assuming it might have been warranted if invasion had been imminent.[14]

STANDARD EMPLOYED IN ISSUANCE OF EXCLUSION ORDER.

It seems clear that the Army used the exclusion procedure in the instant case to suppress speech which it considered undesirable. It considered within its jurisdiction "any activities which might induce disaffection" (R. I. 251, 253, 254). It was on this basis that the order against petitioner appears to have rested, with the petitioner's speeches deemed to be activities within this category. The review and recommendation of the Assistant Chief of Staff of the Civil Affairs Division to the Commanding General, emphasized as the basis for his recommendation of exclusion that petitioner's activities were such as to cause "dissension and unrest" (R. II, 350).

Indeed, respondent has made little attempt to establish that petitioner himself might have committed espionage and sabotage but merely that his activities might have encouraged others to do so; and the order was upheld by the Circuit Court on this basis (R. 337-338). But we believe it logically follows, and is clear on any analysis, that statements of the type here in issue, which give no indication of an intention to commit espionage or sabotage, or of the view that it should be committed, would not, by the same token, cause its commission. In any event, however, we do

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[14] That the respondent himself did not believe in the necessity for petitioner's exclusion seems apparent from his conduct, and is a further substantiation of the unreasonableness of the order. For despite the supposed necessity for petitioner's immediate exclusion in December, 1942, when the order was issued, its execution was stayed on two occasions; and four months after the exclusion was effected, which was nine months after it was first ordered, the order was suspended (R. 287).

not believe the order can be sustained on the basis that it was directed at the prevention of dissension or unrest or at the prevention of the encouragement of espionage or sabotage by others. For, as stated in the *Hirabayashi* case: "facts and the inferences which could be rationally drawn from them [must], support the judgment of the military commander" that the order was appropriate to meet a "danger of espionage and sabotage to our military resources [that] was imminent" (320 U. S. at p. 91). The danger that petitioner's activities might at some indefinite future date encourage espionage and sabotage by persons who might at some time be influenced by them, can hardly be deemed an imminent danger of espionage or sabotage. And an exclusion order issued on the basis here involved can not be deemed authorized by the Executive Order and the statute. This conclusion clearly follows from this Court's decision in Ex parte *Endo,* 323 U. S. 283, in which the commander's order was invalidated on the basis that it was unauthorized. In that case, as in the instant one, there was no danger of the commission of espionage and sabotage by the subject of the order. That is, there as here the the justification alleged for the order was that it was necessary as part of a program of preventing espionage and sabotage by others; and this Court held that the statute was to be construed as authorizing the issuance only of orders directly connected with that objective.

And it seems clear that the issuance of exclusion orders on such a flimsy basis as the prevention of that amount of dissension or unrest that Mankind United could engender, or of the encouragement of espionage and sabotage in such a vague respect as that here involved, would not be a valid exercise of the war power as limited by the due process clause. For the interference with liberty could not be deemed balanced by a sufficient benefit to the war effort. Further, if Public Law 503 were construed as authorizing

orders on such an indefinite and limitless basis, it would clearly involve an unconstitutional delegation of legislative power. In view of these patent grounds for invalidating the order, we shall merely note that an attempt to uphold it on the basis that it deterred dissension and unrest would require its scrutiny in the light of the rigid constitutional protection accorded to freedom of speech.[15]

C. THE EXCLUSION ORDER WAS NOT AUTHORIZED BY EXECUTIVE ORDER 9066 AND PUBLIC LAW 503.

There is no indication in the history of Executive Order 9066 or the legislative history of Public Law 503 that exclusion orders such as that here involved were intended to be authorized.[16] And the Order and the Law should be construed, if possible, so as to preserve their constitutionality. *See* Ex parte *Endo,* 323 U. S. 283. Thus, the Order and statute are to be deemed to intend a constitutional procedure in the issuance of orders, the issuance only of orders for which there is a reasonable basis and which are within the war power, and only those which do not involve an unconstitutional delegation of legislative power. On the ground of each of these limitations of authority, the order against petitioner is invalid. (See discussion under Headings A and B *supra*).

As to the question of delegation, it is to be noted that even if the instant order were directed at the prevention of espionage and sabotage by the petitioner rather than the prevention of the encouragement of such commission by

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[15] Bridges v. California, 314 U. S. 252; Thornhill v. Alabama, 310 U. S. 88; West Virginia State Board of Education v. Barnette, 319 U. S. 624; Thomas v. Collins, 323 U. S. 516; Schneider v. State, 308 U. S. 147; Hartzell v. United States, 322 U. S. 680.

[16] The Order was promulgated and the statutes enacted primarily to permit the mass evacuation of persons of Japanese descent from the West Coast. 88 Cong. Rec. 2723, 2730 (1942).

others, the issuance of such order would involve a much broader delegation of legislative power than that involved in the measures at issue in the *Hirabayashi* and *Korematsu* cases. For in the *Hirabayashi* case this Court pointed out that in view of the legislative history of Public Law 503, the discretion exercised in ordering the curfew was only as to when, if at all, and on what part of the West Coast to impose it. For Public Law 503 ratified the previously announced intention of imposing such a curfew on citizen as well as alien Japanese on the West Coast and thus could be read as if explicitly referring to and explicitly authorizing such a curfew. The extent of discretion exercised by respondent in his exclusion from the West Coast of all persons of Japanese ancestry was similarly limited to a determination of when, and over what portion of the West Coast, to make this measure effective, since Congress was informed both as to the nature and general locality of the contemplated evacuation and as to the subject of it. *Hirabayashi v. United States,* 90, 91; *Korematsu v. United States,* 323 U. S. 214, 216.

As to individual exclusion orders, however, no program of exclusion of citizens of ancestries other than Japanese had been promulgated, or intention to promulgate it announced, prior to the Act's passage. Thus, in ordering the exclusion of a citizen such as petitioner, respondent's discretion was completely unchartered except for the fact that his acts were to be for "protection against espionage and against sabotage to national-defense material, national-defense premises and national-defense utilities."[17] Accordingly, in determining to exclude petitioner, the respondent, guided only by this general standard adjudged what mem-

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[17] This standard was supplied by Executive Order 9066 and is to be deemed incorporated in Public Law 503. (See *Hirabayashi* case at p. 97)

ber of the citizenry to subject to his authority, with no direction or determination by Congress as to the class or type; what type of restriction to impose upon him; and where and when such restriction was to apply. This delegation of power seems clearly excessive. Compare *Schechter Poultry Corp. et al. v. United States,* 295 U. S. 495; *Panama Refining Co. v. Ryan,* 273 U. S. 388.

II

THE ENFORCEMENT OF THE EXCLUSION ORDER BY FORCIBLE EXPULSION WAS UNCONSTITUTIONAL AND WAS NOT AUTHORIZED BY EXECUTIVE ORDER 9066 OR PUBLIC LAW 503.

A. SUCH ENFORCEMENT WAS UNCONSTITUTIONAL.

It would seem self-evident under the system of government existing in the United States that the seizure of a citizen by a troop of soldiers, his expulsion by such soldiers from his home, and his enforced obedience to their directions, could be justified only by the direst emergency. And it is equally self-evident that at the time of the use of force against petitioner there was no such emergency; that there was no impediment to the functioning of the courts and of civil process which might have justified turning law-enforcement over to the military. The attitude in the United States towards the use of military process was explained by this Court with fervor and emphasis in Ex parte *Milligan,* 4 Wall. 2; *Sterling v. Constantin,* 287 U. S. 378; and *Duncan v. Kahanamoku,* 327 U. S. 304, and needs no amplification here. In the last cited case this Court stated:

> "Courts and their procedural safeguards are indispensable to our system of government. They were set up by our founders to protect the liberties they valued * * *. Our system of government clearly is the antithesis of total military rule * * *. For that reason we have maintained legislatures chosen by citizens or their representatives and courts and juries to try those who violate legislative enactments." (at p. 308).

The Circuit Court appears to accept respondent's position, with little question, that if the issuance of the order was justified, its enforcement by the troops was also *ipso facto* justified. But this appears to be a nonsequitur based on the premise that the military has all-embracing authority, if it has any, instead of its being merely an integral part of our system of government. On this logic, troops could have invaded every farm, home and factory in the country to enforce the numerous extraordinary measures justified by military necessity during World War II, to drag those unwilling to serve in the Army to barracks, or to seize merchandise or food that the Army ordered without resorting to civil process. We believe that it would take a much greater showing of emergency to justify law-enforcement by the military than to justify the mere issuance of an order by the military acting as the administrator of power delegated by the Executive and Congress in accordance with customary governmental methods.

For, while the mere issuance of orders by the military as administrator involves no question of martial law, the military's direct enforcement of such orders without resort to civil process and without an opportunity for complete judicial consideration of their validity, is another matter. Such enforcement is akin to an exercise of military rule in that it derogates from the powers of the judiciary. *Cf. Duncan v. Kahanamoku, supra.* And clearly the military situation in September, 1943 (See R. 227), fell far short of justifying such an exercise of military rule. For, as in Ex parte *Milligan,* 4 Wall. 2, and the *Duncan* case, there was no disruption of the orderly processes of government justifying a substitution of military for civil process. The pertinent factual consideration is not that there were a few infrequent incidents of enemy action along the Pacific Coast but that the country was free of the extraordinary state of emergency created by the imminence of invasion, and that

the civil government was functioning normally.[18] Certainly, when the slight degree of harm that could reasonably be deemed forseeable from petitioner's activities (*supra*, pp. 21-24) is considered in the light of the military situation, the military action against him cannot be justified as reasonable. And that there was no emergency justifying the summary military enforcement of the order, is clear from the suspension of the order four months after the forcible expulsion, despite the absence of any essential change in the military situation in the interim (See R. 286). It is a fair inference that in regard to the forcible expulsion, as in regard to the denial of a right to hearing (*supra*, pp. 16-20), respondent was chiefly interested in an assertion of the breadth of military power, rather than in a fear of harm to the country by petitioner.

Petitioner's forcible expulsion, then, was a violation of due process of law because there was no emergency sufficient to justify military enforcement of the order by summary seizure and eviction in place of the customary process of law enforcement, through criminal prosecution. The substitution of military for civil enforcement deprived petitioner, without justification, of the customary choice betweeen obedience to the law and punishment; and the use of force also violated due process because petitioner was thus denied an adequate means for a judicial review of the order. It is fundamental that the subject of an Executive or administrative order is entitled to judicial determination of the validity of the order before he is subject to irreparable injury at the hands of the Executive or administrator. *See Utah Fuel Co. v. National Bituminous Coal Commis-*

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[18] See *Schueller* v. *Drum*, 51 F. Supp. 383 (E. D. Pa., 1943); *Scherzberg* v. *Madeira*, 57 F. Supp. 42 (E. D. Pa., 1944); and *Ebel* v. *Drum*, 52 F. Supp., 189 (D. Mass., 1943), in which individual exclusion orders were invalidated for this reason.

sion, 306 U. S. 56; *Smith v. Illinois Bell Telephone Co.,* 270 U. S. 587; see also *Euclid v. Ambler Realty Co.,* 272 U. S. 365, 366; *Pennsylvania v. West Virginia,* 262 U. S. 553, 592; *Oklahoma Natural Gas Co. v. Russell,* 261 U. S. 290, 293.

Indeed, the right to an adequate remedy where a violation of constitutional rights is alleged is itself guaranteed by the Constitution under the due process clause. *Gibbes v. Zimmerman,* 290 U. S. 326, 332. Respondent did irreparable injury to petitioner before petitioner secured a complete judicial review of respondent's order and in fact subverted petitioner's right to such review.[19] And even if petitioner had not in fact been irreparably injured by forcible expulsion before judicial review of the exclusion order, the mere fact that he was subject to this risk rendered the respondent's asserted authority unconstitutional. For petitioner was under the constant danger that his home would be entered and he would be summarily seized by extraordinary military force if he attempted to commence a civil action instead of immediately obeying the military order. Where the right to resort to the courts is fraught with such an extraordinary danger of physical force, the right to an adequate legal remedy has been denied. See *Life & Casualty Insurance Co. of Tennessee v. McCray,* 291 U. S. 566;

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[19] Even assuming that an injunction suit commenced by the subject of the order could be deemed to offer an adequate means of review, petitioner was denied this means; before the petitioner could even file an appeal from the District Court's order denying the injunction, in fact even before he heard that the order had been issued, the process of excluding him by force had begun (R. 267). Further, his appeal from the District Court decision was rendered moot by rescission of the Exclusion Order (R. 287-289). And obviously the present action for damages does not constitute an adequate remedy for the expulsion; this point is established by implication by the District Court's decision in the injunction suit, and by the Circuit Court's decision in *Alexander v. DeWitt,* 141 F. (2d) 573 (C. C. A. 9th, 1944).

St. Louis, I. M. & S. Ry. Co. v. Williams, 251 U. S. 63; *Crowell v. Benson*, 285 U. S. 22, 60; see also *Southern Ry. Co. v. Commonwealth of Virginia*, ex rel. *Shirley*, 290 U. S. 190, 198.

The case at bar falls well within the rule of these cases. There can be no question that summary seizure and ouster by troops as a possible consequence of disobedience to the exclusion order would deter a bona fide attempt to test the validity of the order and would prevent such a test being safely made. The possiblity of an action for damages, as the instant one, cannot be considered a sufficiently adequate redress for such a summary seizure and ouster so as to prevent its having an unconstitutional effect as a deterrent. Accordingly, the power claimed by respondent was a violation of due process of law.

The invalidity of enforcement through physical expulsion is further established by the circumstance that the procedure prior to the issuance of the exclusion order had not afforded petitioner an adequate opportunity to refute the information on which it was based and to defend himself against its issuance. Accordingly, due process required that such opportunity be afforded in judicial proceedings to enforce the order (see *supra*, p. 20).

B. ENFORCEMENT OF THE EXCLUSION ORDER AGAINST PETITIONER BY MILITARY FORCE WAS NOT AUTHORIZED BY EXECUTIVE ORDER 9066 AND PUBLIC LAW 503.

While it is true that the statement quoted in the Circuit Court opinion from remarks on the floor of Congress (R. 330) indicates the quoted Congressman's understanding that General DeWitt could use military force to enforce his exclusion orders, the legislative history is not consistent on this question. Thus a Congressional Committee investigating the West Coast situation stated, as to General DeWitt's powers under Executive Order 9066:

> "In transferring authority over evacuation to the War Department the President authorized and directed

the Secretary of War and the appropriate military commanders to take such steps as he or they might deem advisable to enforce compliance, including the use of Federal troops and other Federal Agencies. However, General DeWitt considered that this authority did not embrace an enforcement procedure and stated that he would find it impossible to enforce his orders pertaining to these military areas without additional legislation." (H. R. 2124, 77th Cong., 2d Sess., Fourth Interim Report of Select Committee of House of Representatives Investigating National Defense Migration (1942), p. 167).

See also Report of Senate Committee on Military Affairs, 88th Cong. Rec. 2724 (1942).

Thus, the statements as to the meaning of the legislation, taken together, support either inference as to respondent's authority to exclude by force. But a clear indication as to his lack of such authority seems to arise from the fact that the authority was first conferred by the President acting alone, when he had no assurance that Public Law 503 would be enacted. For whatever the power of Congress and the President, together, certainly it would have been beyond the power of the President acting alone to authorize summary execution of the orders of a military commander and the use of federal troops against the civilian population. We should not imply an intention to the Executive Order which would render it illegal when a simple interpretation of the language used would not be repugnant to constitutionality. There are many ways in which Federal troops could properly be used in enforcing compliance with the orders and restrictions of the Commanding General and which the President acting alone might authorize.[20] For example,

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[20] The language on which respondent bases his assertion of authority is the following provision of the Executive Order, which concededly was ratified by Public Law 503:

"I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other

under Army Regulations 600-655 Federal troops could be authorized to aid in the enforcement of the orders and regulations by arresting the alleged violator and using such force as was reasonably necessary to bring him before the appropriate civil authority for action under Public Law 503. There is nothing in the Executive Order which indicates that the President intended to authorize any further action by Federal troops than that of such a nature and he should not be charged with the attempt far to exceed his authority by implying a broader interpretation of his language than was intended.

Finally, as we believe we have already demonstrated, even the President and the Congress jointly could not constitutionally have authorized petitioner's expulsion. The order and the statute should therefore be construed as not granting this power, in order to render them constitutional.

III

The respondent is liable for damages for his exclusion of petitioner.

At the outset of a consideration of respondent's liability, it is to be borne in mind that respondent was not merely a minor administrative figure nor was he merely carrying out an assigned military duty; but rather he was acting in a broad executive capacity, devising and executing a program of civilian controls. The very promulgation of Executive Order 9066 and Public Law 503, under which respondent purported to act, was at his instance (R. 217-223). Further, the procedure for the issuance of the exclusion order

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steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area hereinabove authorized to be designated, including the use of Federal troops and other Federal agencies, with authority to accept assistance of state and local agencies."

against petitioner was devised by respondent (R. 228); the exclusion order was issued on respondent's initiative; no superior officer considered its advisability (R. I, 260); and respondent determined upon petitioner's forcible exclusion (R. 57-59, 103). And the program was from its inception criticized as unconstitutional (R. 248).

The justification for the instant action for damages is also demonstrated by the difficulty—in fact the impossibility, of petitioner's otherwise securing a review of respondent's acts. The exclusion procedure devised by respondent afforded no manner of judicial review for his acts. Then, by determining upon enforcement of his order by military force, respondent foreclosed the review which would have been a concomitant of criminal prosecution. Though the injunction suit would not in any event have provided the full review of the validity of the order to which petitioner is entitled, the respondent mooted petitioner's appeal in the injunction suit so he could not obtain a consideration of his constitutional rights in the higher courts.

The facts of the instant case thus provide a concrete illustration of the indispensability, within the framework of our limited forms of action, of the action for damages as a method of check and redress against those entrusted with governmental functions.

The importance of the action for damages in cases affecting constitutional rights points to a major division in the precedents on the liability of officials, which establishes liability in the instant case. For where the act complained of is unconstitutional, it is by the same token to be deemed clearly outside the scope of the official's authority. Thus, since we maintain that respondent's issuance and enforcement of the exclusion order were not only unauthorized but unconstitutional, we need not indulge in a close analysis of the cases holding an officer liable because he had acted clearly outside the scope of his authority, and those deny-

ing liability on the ground that he had acted within such scope but had merely made an error of law or fact. As to an official's liability for an unconstitutional action, see *Poindexter v. Greenhow*, 114 U. S. 270 (especially 288-290); *Hopkins v. Clemson Agricultural College*, 221 U. S. 636, 643-644; *Nixon v. Herndon*, 273 U. S. 536; *Yearsley v. Ross Construction Co.*, 309 U. S. 18; *Belknap v. Schild*, 161 U. S. 10, 18; *Kilbourn v. Thompson*, 103 U. S. 168; consider *Moyer v. Peabody*, 212 U. S. 78.[21]

Not only is the instant action for damages based on established principle, but a denial of its propriety might of itself be unconstitutional. For due process of law guarantees that the courts furnish a method for securing review of an alleged deprivation of constitutional rights and a remedy for such a deprivation. See cases cited *supra*, pp. 32-33; see also *Bell* v. *Hood*, 90 Law. Ed. 768. In the instant case there was no form of action other than an action for damages by which petitioner was able to secure such a review and remedy.

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[21] The rule is the same whether the statute as a whole is unconstitutional or as is more customarily the case, the Court is only concerned with the constitutionality of the particular application of it with which the defendant official is charged. See Poindexter v. Greenhow, 114 U. S. at p. 295:

> "And it is no objection to the remedy in such cases, that the statute whose application in the particular case is sought to be restrained is not void on its face, but is complained of only because its operation in the particular instance works a violation of constitutional right." See also the same case, at p. 270.

No exception to the rule of liability is made in the case of military officers. See Luther v. Borden, 7 How. 1; Mitchell v. Harmony, 13 How. 115; see also McCall v. McDowell (C. C., D-Cal. 1867) Fed. Cas. No. 8673, 15 Fed. Cas. 1235; Milligan v. Hovey, 3 Biss. 13, Fed. Cas. No. 9605. In any event, it is to be borne in mind that respondent in the instant case was exercising general governmental power rather than merely performing a duty in the course of combat or other customary military operations.

EVEN IF RESPONDENT'S ISSUANCE OF THE EXCLUSION ORDER AND FORCIBLE EXPULSION OF PETITIONER WERE NOT UNCONSTITUTIONAL BUT WERE MERELY OTHERWISE OUTSIDE THE SCOPE OF THE AUTHORITY GRANTED BY EXECUTIVE ORDER 9066 AND PUBLIC LAW 503, HE IS LIABLE IN THIS ACTION.

It is established that an official is personally liable for acts committed outside the scope of his authority, on the basis that he is, in such event, not acting for the Government but as any other individual. *Little v. Barreme*, 2 Cranch. 170; *Wise v. Withers*, 3 Cranch. 331; *Kendall v. Stokes*, 3 How. 87; *Bradley v. Fisher*, 13 Wall. 335; *Bates v. Clark*, 95 U. S. 204, 209; *Spalding v. Vilas*, 161 U. S. 483; *Standard Nut Margarine Co. of Florida v. Mellon*, 72 F. (2d) 557, *cert. denied*, 293 U. S. 605 (1934); *Cooper v. O'Connor*, 99 F. (2d) 135 (1938), *cert. denied*, 305 U. S. 643. See HARPER ON TORTS, pp. 666 *et seq.* While no liability is generally imposed if the official merely makes a mistake of law or fact while acting within his authority, this rule has no applicability in the instant case. Thus, respondent would not be liable if we were merely able to show a mistake of fact in that information upon which he had reasonably relied with regard to petitioner was in fact untrue. Or if he had merely made a mistake of law while acting within the scope of his authority, in that, for example, he had had authority to exclude petitioner but only from a smaller area than that designated. But here, we contend, respondent had no authority whatever to exclude petitioner because he was not intended to issue exclusion orders, if in any event against individual citizens, on the basis of the procedure here used, or on the basis of only an indirect connection between the subject of the order and the prevention of espionage or sabotage, nor to enforce exclusion orders, by physical force.

CONCLUSION.

Wherefore it is respectfully requested that this petition be granted.

Respectfully submitted,

A. L. WIRIN,
Counsel for Petitioner.

ARTHUR GARFIELD HAYS,
OSMOND K. FRAENKEL,
NANETTE DEMBITZ,
MARION P. AMES,
WALTER T. GELLHORN,
Of the New York Bar,
Counsel for the National Office
AMERICAN CIVIL LIBERTIES UNION

A. L. WIRIN,
Counsel for the Southern California Branch
AMERICAN CIVIL LIBERTIES UNION

FRED OKRAND,
CHARLES A. HORSKY,
Of Counsel.

June, 1947.

APPENDIX A.

CONSTITUTION OF THE UNITED STATES:

ARTICLE I

SECTION 1. All legislative Powers herein granted shall be vested in a Congress of the United States * * *

* * * * * * * * * *

SECTION 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; * * *

* * * * * * * * * *

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

* * * * * * * * * *

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all others Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

* * * * * * * * * *

ARTICLE II

* * * * * * * * * *

SECTION 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; * * *

* * * * * * * * * *

Fifth Amendment:

No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *

* * * * * * * * * *

APPENDIX B.

PUBLIC LAW 503

Act of March 21, 1942, ch. 191, 56 Stat. 173 (18 U. S. C., Supp. III, 97a.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense.

APPENDIX C.

EXECUTIVE ORDER No. 9066, FEBRUARY 19, 1942, 7 F. R. 1407

Authorizing the Secretary of War to Prescribe Military Areas

Whereas the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655 (U. S. C., Title 50, Sec. 104):

Now, Therefore, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. The Secretary of War is hereby authorized to provide for residents of any such area who are excluded therefrom, such transportation, food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary of War or the said Military Commander, and until other arrangements are made, to accomplish the purpose of this order. The designation of military areas in any region or locality shall supersede designations of prohibited and restricted areas by the Attorney General under the Proclamations of December 7 and 8, 1941, and shall supersede the responsibility and authority of the Attorney General under the said Proclamations in respect of such prohibited and restricted areas.

I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions

applicable to each Military area hereinabove authorized to be designated, including the use of Federal troops and other Federal Agencies, with authority to accept assistance of state and local agencies.

I hereby further authorize and direct all Executive Departments, independent establishments and other Federal Agencies, to assist the Secretary of War or the said Military Commanders in carrying out this Executive Order, including the furnishing of medical aid, hospitalization, food, clothing, transportation, use of land, shelter, and other supplies, equipment, utilities, facilities, and services.

This order shall not be construed as modifying or limiting in any way the authority heretofore granted under Executive Order No. 8972, dated December 12, 1941, nor shall it be construed as limiting or modifying the duty and responsibility of the Federal Bureau of Investigation, with respect to the investigation of alleged acts of sabotage or the duty and responsibility of the Attorney General and the Department of Justice under the Proclamations of December 7 and 8, 1941, prescribing regulations for the conduct and control of alien enemies, except as such duty and responsibility is superseded by the designation of military areas hereunder.

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 162

HOMER GLEN WILCOX, PETITIONER

v.

LIEUTENANT GENERAL J. L. DE WITT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the United States District Court for the Southern District of California (R. 215–303) are reported at 67 F. Supp. 339, *sub nom. Wilcox* v. *Emmons*. The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 324–339) is reported at 161 F. 2d 785.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 28, 1947 (R. 340). The petition for a writ of certiorari was filed June 28, 1947. The jurisdiction of this Court is invoked

under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the order of respondent in the instant case, excluding petitioner from vital defense areas, was valid.

2. Whether respondent could lawfully enforce the exclusion order by the use of military personnel.

3. Whether, assuming *arguendo* that either the exclusion order or the method employed for its enforcement were invalid, respondent may be held personally liable in damages in the circumstances of the instant case.

STATUTE AND EXECUTIVE ORDER INVOLVED

The statute and Executive Order involved are set forth in the Appendix, *infra,* pp. 30–32.

STATEMENT

Petitioner brought suit against respondent, the Military Commander for the Western Defense Command,[1] seeking damages against respondent in his personal capacity for the alleged illegal removal of petitioner from California through the use of troops (R. 2–11). After answer both parties moved for summary judgment (R. 215).

[1] The Western Defense Command embraced the States of California, Oregon, Washington, Idaho, Montana, Utah, Nevada, and Arizona (R. 216).

The facts found by the District Court (R. 216–296)[2] may be summarized as follows:

For some time prior to December 17, 1942, there had been under consideration the question whether petitioner should be excluded from certain areas of the Western Defense Command as a potentially dangerous individual (R. 230–238). On that date, petitioner, together with certain other persons, was indicted by the Federal Grand Jury for the Southern District of California under the provisions of Section 4 of the Act of June 15, 1917, c. 30, 40 Stat. 217, 219, 50 U. S. C. 34, for conspiracy to commit sedition (R. 238). On December 28, 1942, acting pursuant to the authority conferred on him by Executive Order 9066 (Appendix, pp. 30–32), respondent, after a study of reports of intelligence agencies concerning the petitioner, the testimony before an Individual Exclusion Hearing Board, the appraisals and recommendations made by the Board, by other staff sections and officers, and by the United States District Attorney for the Southern District of California, issued Exclusion Order V–7 addressed to the petitioner (R. 239–240).

That order provided that ten days after its receipt by petitioner he was prohibited from being in, remaining in, or entering Military Areas

[2] The adequacy and correctness of these findings were not challenged by either party on the appeal in the court below, and are not raised by the petition herein either in the questions presented or by way of specification of errors.

Nos. 1 and 2, Western Defense Command (comprising the States of Arizona, California, Oregon, and Washington), as well as certain states along the Atlantic coastline, and the Gulf of Mexico (R. 240–242). The exclusion order was served on petitioner on January 22, 1943 (R. 243). At the same time he was served with another document, dated January 14, 1943, staying the enforcement of the exclusion order, and permitting him to remain in Military Areas Nos. 1 and 2 under certain security conditions pending the conclusion of the criminal case,[3] but requiring him to leave such areas at the conclusion thereof, irrespective of its outcome (R. 243–246). On May 6, 1943, petitioner was convicted of conspiracy to commit sedition and was sentenced to serve five years in a federal penitentiary (R. 248). On May 10, 1943, petitioner filed notice of appeal to the Circuit Court of Appeals for the Ninth Circuit and, upon application to the District Court, was released on bail pending such appeal (R. 248–249).[4]

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[3] Petitioner was a party to three proceedings, all of which have a bearing on the instant case. The first was the criminal case for conspiracy to commit sedition; the second was an action to enjoin the present respondent from enforcing the exclusion order; and the third is the instant action seeking damages. For the sake of brevity and ready identification they are hereinafter referred to as the criminal case, the injunction case, and the damage case.

[4] Petitioner's conviction was recently reversed in *Bell* v. *United States*, 159 F. 2d 247 (C. C. A. 9), on the authority

Meantime, on March 25, 1943, petitioner filed suit in the District Court for the Southern District of California against General DeWitt and others, setting forth two causes of action (R. 246). The first cause of action sought a judgment declaring that the exclusion order and the stay order were both void and unconstitutional and restraining enforcement of the orders "directly or indirectly by any means, method or device whatsoever;" the second sought to recover damages in the sum of $50,000 and exemplary damages in the sum of $5,000 (R. 246–247). Petitioner did not leave Military Areas Nos. 1 and 2 after he was convicted in the criminal case, but, since the injunction suit was still pending, General DeWitt on May 29, 1943, further stayed enforcement of the exclusion order until the conclusion of the trial of the injunction case on conditions which were substantially the same as those contained in the stay order of January 22, 1943 (R. 254–255).

Following a preliminary hearing in the injunction suit, the court, on May 20, 1943, filed a "Memorandum of Conclusions," summarizing the case and concluding that the defendants were not liable in damages to petitioner, denying the application for an injunction *pendente lite,* and

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of the decision of this Court in *Ballard* v. *United States*, 329 U. S. 187, holding invalid an indictment returned by a grand jury whose panel did not include women.

setting the case down for early trial on the merits (R. 250–253). On the same day, and prior to the filing of the Memorandum of Conclusions, the petitioner, with the approval of the court, dismissed without prejudice his claim for damages (R. 253).

About this time—after petitioner's conviction in the criminal case, but before the granting of the stay in consequence of the injunction case—respondent had asked the War Department to request the Department of Justice to prosecute petitioner under Public Law 503—the Act of March 21, 1942, c. 191, 56 Stat. 173, 18 U. S. C., Supp. V, 97a (Appendix, *infra*, p. 30)—for refusing to comply with the exclusion and stay orders (R. 249). That request was conveyed to the Attorney General by letter dated May 18, 1943 (R. 249). The Department of Justice advised the War Department that it did not intend to institute criminal proceedings against petitioner for violation of the 1942 Act because that violation was a misdemeanor only, carrying a maximum sentence of one year, and petitioner had already been convicted of a felony, and had been sentenced to five years' imprisonment upon facts which, in the Department's opinion, were essentially the same as those upon which the exclusion order was based (R. 255–256). On July 30, 1943, respondent was again advised by the Department of Justice that it would not prosecute petitioner under the Act of March 21, 1942, even though he

should continue to violate the exclusion order, if the District Court held the order to be valid (R. 257). On the same day, the War Department authorized respondent to remove petitioner by the use of military personnel, by force if necessary, provided the court's decision in the injunction case was favorable to the defendants (R. 257). Both the Attorney General and the Judge Advocate General of the Army had previously advised that, if the military authorities believed recalcitrant excludees to be sufficiently dangerous to the military security of military areas, they had the express power to exclude them by force under Executive Order 9066 (R. 248, 254; see also R. 109, 111–112).[5]

Thereafter, on August 1, 1943, respondent instructed the Commanding General, Southern California Sector, Western Defense Command, that if the court should uphold the validity of the exclusion order and petitioner should continue to violate such order, he should be escorted out of the prohibited areas under military guard (R. 257–263).

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[5] Executive Order 9066, *infra*, p. 32, provided in part:

"I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area hereinabove authorized to be designated, including the use of Federal troops and other Federal Agencies, with authority to accept assistance of state and local agencies."

758499—47——2

The injunction case then came on for trial. At the conclusion of the trial, the district court on September 4, 1943, entered an order denying an injunction, and filed a memorandum which stated in part (R. 264–265):

> Taking into consideration the record in its entirety we cannot say that the Commanding General did not have ground for believing that plaintiff had committed acts of disloyalty, that he had engaged in a kind of leadership which might instigate others to carry on activities which would facilitate the carrying on of espionage and sabotage, and that his continued presence in the area from which he had been ordered excluded constituted a danger to the military security thereof.
>
> * * * * *
>
> Accordingly we conclude that plaintiff's application for an injunction must be denied, and that this suit must be dismissed. Likewise we are convinced that plaintiff without further delay should obey the Exclusion Order directed against him, as this Court will do nothing which might seem to interfere with the enforcement of such Order.[6]

Thereafter, the District Court filed findings of fact and conclusions of law (R. 270–282). The District Court specifically found:

> That the individual exclusion order was

[6] Notice of appeal was filed on November 22, 1943 (R. 285).

issued by Lt. Gen. John L. DeWitt after a study by him of the reports of intelligence agents of the United States Government, the information received from the questionnaire filed by plaintiff with the Board, the testimony of the Board hearing on November 3, 1942, and the appraisals and recommendations made by the Board, by other staff officers, and by the United States District Attorney for the Southern District of California. The administrative file (Defendant's Exhibit D), the material contained in which was uncontradicted at the trial, shows that Wilcox at the time of the issuance of the order was the San Diego County Supervisor of "Mankind United," an organization which is opposed to the present war. The file shows that at meetings held in various parts of Southern California within Military Area No. 1 and after the entrance of the United States into war, the plaintiff made speeches and urged action by his hearers, the extent and nature of which may be summarized as follows: The war is being fought for the "war lords" who are prolonging it for their profit. War bonds should not be purchased as the war will thereby be prolonged. Defense workers who are building warplanes and war implements should realize that such equipment will be used against them, "Mankind United" will be able to stop the war by striking at the manufacture of war equipment and destroying munition dumps.

People should not enlist in first aid courses. Dimout regulations, gasoline and rubber rationing were unnecessary and were merely an effort on the part of the Government to curtail the liberties of the people. (Finding XIX, R. 277–278.)

* * * * *

That the evidence concerning plaintiff's activities and associations provided a reasonable ground for the belief by defendant, Lt. Gen. John L. DeWitt, that plaintiff had committed acts of disloyalty and was engaged in a type of subversive activity and leadership which might instigate others to carry on activities which would facilitate the commission of espionage and sabotage and encourage them to oppose measures taken for the military security of Military Areas Nos. 1 and 2, and that plaintiff's presence in the said areas from which he had been excluded would increase the likelihood of espionage and sabotage and would constitute a danger to the military security of those areas. It was, therefore, a reasonable precaution, in the light of the said dangers, to exclude plaintiff from Military Areas Nos. 1 and 2. (Finding XXII, R. 278–279.)

That the exclusion procedure adopted by the defendant, Lt. Gen. John L. DeWitt, was designed to protect the vital war industries, lines of communication, military installations and resources located within Military Areas Nos. 1 and 2 of the Western

> Defense Command, and was appropriate for that purpose. Individual exclusions of those persons who are deemed to be potentially dangerous to the security of designated military areas is a recognized military procedure designed and appropriate for the purpose of safeguarding military areas against potential sabotage and espionage and other subversive activity. (Finding XXIII, R. 279.)

And the District Court concluded as a matter of law (R. 281–282)—

> The Individual Exclusion Order No. V–7 directed to plaintiff was not issued arbitrarily, was made in good faith, was dictated by adequate reasons of military necessity, and was a reasonable and appropriate means to prevent espionage and sabotage and to preserve the military security of said Military Areas Nos. 1 and 2. (Conclusion IX.)
>
> The said Exclusion Order is legally and constitutionally valid both from the standpoint of substance and procedure. (Conclusion X.)

Immediately after receiving notification that the injunction had been denied, respondent notified the Office of the Assistant Secretary of War by telephone of the court's decision and stated that he was ready to proceed with the removal of petitioner by use of military personnel (R. 265). Respondent was then advised by the Assistant Secretary of War, Mr. McCloy, to proceed

to remove petitioner by use of troops, and this authorization was given with the approval of the Secretary of War, Mr. Stimson, and the Chief of Staff, General Marshall (R. 265–266). Acting pursuant to the authorization from the War Department, respondent, on September 6, 1943, directed that petitioner be escorted from the prohibited area of the Western Defense Command by military personnel (R. 266–267). Petitioner was thereupon apprehended and, without personal violence, was removed to Las Vegas, Nevada, a destination which he had selected (R. 268–269).

The policy of the Commander of the Western Defense Command was to review exclusion cases periodically. The matter of petitioner's exclusion was reconsidered by Lt. General Emmons, who, on September 17, 1943, had succeeded respondent as Commander of the Western Defense Command, and who, on November 27, 1943, ordered that the exclusion order be continued in effect (R. 269, 285–286). On January 15, 1944, Lt. General Emmons, after further consideration of petitioner's case, suspended the exclusion order, and on January 18, 1944, petitioner was advised that he might return to the State of California, which he did on January 20, 1944 (R. 286–287). On March 22, 1944, Exclusion Order V–7 was rescinded by Lt. General Emmons in the light of the then existing conditions (R. 287).

Thereafter, on June 1, 1944, a stipulation was filed with the Circuit Court of Appeals in the in-

junction case, in which counsel for the parties stipulated that "the appeal pending herein be dismissed upon the following terms and conditions, to-wit, without prejudice to any new or further proceedings arising out of appellant's expulsion from the State of California, as involved herein; and that said appellant will pay costs and to the Clerk of the court any fees that may be due to him" (R. 287–288). The order of the court dismissing the appeal in accordance with the terms of the stipulation was entered on July 31, 1944 (R. 289–290; *Wilcox* v. *DeWitt,* 144 F. 2d 353).

On September 5, 1944, petitioner instituted the instant action, alleging that his removal by respondent was illegal both on the ground that the exclusion order, on which the removal was based, was invalid, and on the ground that respondent, in any event, lacked authority to compel his removal through the use of troops (R. 2–11, 290). The complaint asked damages in the sum of $3,500, but subsequently petitioner filed a waiver of all damages in excess of $100 (R. 83, 291, 296, 303). On July 29, 1946, the District Court filed its findings of fact and conclusions of law (R. 215–303), and gave judgment for petitioner in the sum of $100 (R. 304–305). The court concluded that the judgment in the earlier injunction case was *res judicata* as to the question of the validity of the exclusion order (R. 297–299). The court decided, however, that Public Law 503

provided the sole means for the enforcement of the exclusion order and that respondent did not have lawful power or authority to exclude petitioner from Military Areas Nos. 1 and 2 by the use of military personnel (R. 299).

On appeal, the judgment of the District Court was reversed and the cause was remanded with instructions to enter a judgment for respondent (R. 340). The Circuit Court of Appeals held that the exclusion order was valid and that respondent could lawfully use military personnel in enforcing it (R. 324–339).

ARGUMENT

Petitioner is one of five persons as to whom individual exclusion orders under Executive Order 9066 and the Act of March 21, 1942, were issued and against whom such orders were enforced through the use of military personnel (R. 107). So far as we are aware, this is the only action for damages which is in or which can now be brought into litigation. The case is therefore *sui generis*. Moreover, the circumstance that, after bringing suit for $3500 (R. 11), petitioner subsequently stipulated that he would waive all damages over $100 (R. 83, 291, 296), strongly suggests that the object of this proceeding for damages was not so much redress for injuries sustained as the obtaining of abstract pronouncements from the courts as to respondent's authority. This he cannot have. We think that, moreover, he cannot have damages, since respondent, having removed

petitioner from a combat zone (R. 217) in good faith, with the approval of his superiors, in reliance on a judicial determination of the validity of his action, and in a manner not palpably beyond his authority, cannot in any event be made personally liable.

Not only is the case therefore unique, but in its essentials it turns on a question of fact, viz., whether there was a rational basis for the order of exclusion. If there was, then the decisions of this Court establish the validity of the order. *Hirabayashi* v. *United States,* 320 U. S. 81; *Korematsu* v. *United States,* 323 U. S. 214. Rationality is, of course, purely factual; and in this instance it has been found in two separate litigated proceedings that the order did have a rational basis (R. 278–279, 281–282, 337–338; cf. R. 299–300.)

The only point decided adversely to General DeWitt in the entire litigation was the holding of the district court in the present case that he was not authorized to use military personnel to enforce the order of exclusion. This holding, directly contrary to the decision in the *Korematsu* case that "The power to exclude includes the power to do it by force if necessary" (323 U. S. at 223), was promptly and properly reversed by the court below.

Three courts, moreover, have found and held that respondent acted throughout in complete good faith (R. 281–282, 295–296, 299–300, 332),

758499—48——3

with the approval of his civil and military superiors in the War Department (R. 281, 254, 257, 265–266, 266–267, 336–337) and on the advice of authoritative civil and military legal advisers (R. 277; R. 248, 254). It is not challenged that petitioner was removed only after a federal court had refused to enjoin such removal on the ground, *inter alia,* that the exclusion order was "legally and constitutionally valid both from the standpoint of substance and procedure" (R. 282).

In these circumstances we submit that the judgment below does not now present any question calling for further review by this Court.

1. *Respondent had authority to enforce the exclusion order through the use of military personnel.*—In this aspect, the case presents a simple statutory question: Did the enactment of the Act of March 21, 1942, withdraw the power conferred by Executive Order 9066, wherein the President authorized and directed the military commanders therein specified "to take such other steps as * * * the appropriate Military Commander may deem advisable to enforce compliance * * * including the use of Federal troops"?

The district court's holding that the criminal penalty contained in the 1942 Act operated to limit the military commander's powers to use physical or military force, and that that Act was intended to be an exclusive means of enforcement (R. 299) is in square conflict with decisions of this Court. In *Hirabayashi* v. *United States,* 320

U. S. 81, 91, 92, 103, it was expressly held, after a careful review of the legislative history, that Congress by the Act of March 21, 1942, had ratified and confirmed Executive Order No. 9066. Inasmuch as that Executive Order specifically provided for enforcement through the use of troops, it necessarily follows, as was held in the *Korematsu* case, that "The power to exclude includes the power to do it by force if necessary" (323 U. S. at 223). Thus the judgment of the district court here made the respondent liable in damages for doing what this Court specifically said he was empowered to do. The court below was consequently right in holding, after a further review of the legislative history (R. 330),[7] that Congress by

[7] The intention of Congress to supplement respondent's power of exclusion is apparent from the following discussion in the House concerning the bill which became Public Law 503 by Congressman Sparkman, a member of the Committee on Military Affairs which reported out the bill recommending its passage, and Congressman Michener (88 Cong. Rec. 2730; R. 330):

"Mr. SPARKMAN. Reserving the right to object, Mr. Speaker, may I say that while our committee was out on the West Coast studying this problem, one of the first things General DeWitt called to our attention was the fact that even though he was given the authority to declare these to be restricted and prohibited areas, he had no way of enforcing the order by penalty, if anyone violated it. All he could do was to move them off. If they came back, there was no penalty provided in the law. He asked for this specific legislation. It is needed immediately because that evacuation is taking place now.

"Mr. MICHENER. Yes; that is in exact harmony with my first statement, that this bill simply implements the Executive Order which is now in force and effect."

passing the Act of 1942 implemented the Executive Order by adding a new method of enforcement, and that this legislation did not take away the military commander's power, already his under the Executive Order, of using troops to enforce removal (R. 332).

In view of the clear purpose of the statute, it is not necessary to belabor the point that the holding of the district court as to the effect of the statute would frustrate the very end of the removal order. But it is pertinent to call attention to the observation of the court below as to the consequences of the district court's holding (R. 328–329):

> It is apparent that a person ordered excluded or a returned excludee, during the period of a misdemeanor prosecution, would be entitled to bail and that he would be at large in the defense area and thus be free to exercise his subversive activities. * * * It cannot be that General DeWitt or Congress thought it an efficient protection for the war menace apprehended from disloyal persons in these thousands, that they would remain for months out on bail during the prosecution of a myriad of misdemeanor suits, crowding out all other litigation from our federal courts.

And, contrary to petitioner's intimation (Pet. 33), there was here no summary seizure and ouster by troops to forestall a test of the validity of the exclusion order. That order was first stayed pending the conclusion of the criminal

case. Even after petitioner had been found guilty by verdict of the jury in that case, the order was further stayed until the conclusion of the trial in the injunction case. Not until the district court in the latter case had refused to enjoin the enforcement of the exclusion order, with a holding that that order "is legally and constitutionally valid both from the standpoint of substance and procedure" (R. 282), did respondent proceed to effect petitioner's removal.[8]

2. *The exclusion order was valid.*—The validity of the exclusion order directing petitioner's removal from a combat zone (R. 217) depends under the decisions of this Court on what is inescapably a question of fact, viz., whether there was a rational basis for respondent to believe, in the exercise of an informed judgment, that petitioner's removal was reasonably necessary to prevent danger of espionage and sabotage.

In *Hirabayashi* v. *United States,* 320 U. S. 81, 92, and again in *Korematsu* v. *United States,* 323 U. S. 214, 217–219, this Court upheld the constitutional validity of blanket curfew and exclusion orders directed to citizens of Japanese ancestry, holding that Congress and the Executive, in the face of threatened danger of enemy

[8] The inadequacy of a prosecution for violation of the 1942 Act in a situation such as this one is self-evident. Petitioner had already been convicted and sentenced to five years' confinement. Further prosecution would not have served to effectuate the purpose of safeguarding against sabotage by removing him from the sensitive coast areas.

attack, had sufficient authority under their power "to wage war successfully"[9] to restrict certain personal liberties of citizens in war zones in order to provide against the danger of espionage and sabotage. It also held that Congress and the Executive had power to delegate that authority to a military commander. The Court further held that whether there was threatened danger of enemy attacks or the possibility of sabotage and espionage in connection therewith was a matter to be determined by the military commander in the proper exercise of his informed judgment, and that his determination would not be disturbed if a rational basis therefor existed. *Hirabayashi* v. *United States,* 320 U. S. at 95, 101, 102, 103–104; *Korematsu* v. *United States,* 323 U. S. at 217, 218.

Here, respondent had determined that the exclusion of petitioner was "dictated by military necessity" (R. 240), having theretofore determined that the Pacific Coast was particularly subject to attack by the enemy (R. 223), a finding that remained in effect until withdrawn (R. 55). Both the district court in the instant case (R. 227) and the district court in the injunction case (R. 272) found as facts that there was a clear and imminent danger of external enemy attack on the Pacific Coast, not only at the time the ex-

[9] Hughes, *War Powers under the Constitution,* 42 A. B. A. Rep. 232, 238.

clusion order was issued but both before and subsequent thereto. The court below took judicial notice of such conditions (R. 327–328). We submit that respondent had reasonable ground for believing that the threat was real and required measures to safeguard the military area from the danger of sabotage and espionage. *Hirabayashi* v. *United States,* 320 U. S. at 94–95. The ends sought to be achieved by the Executive Order and the statute were the prevention of "espionage and sabotage", and exclusion has been held to be an appropriate way to meet these twin dangers. *Korematsu* v. *United States,* 323 U. S. at 217–218.

Consequently, the exclusion order was valid if there was a rational basis for respondent's conclusion that petitioner's mental attitude was such that he might engage in either espionage or sabotage.

The present record shows that such a rational basis did in fact exist. The vulnerability of the Pacific Coast at the time of petitioner's removal, in the face of enemy capabilities at that time, is shown not only by the views of the officers particularly concerned with its security (R. 42–50, 92–96) but also by the affidavit of the Chief of Staff, General of the Army George C. Marshall (R. 58–59). The correctness of these views is confirmed by the findings in the injunction case (R. 272) and in this case (R. 227) and by the holding below (R. 327–328). It is significant

that petitioner does not directly challenge these findings—and in view of his failure to specify them as error he may not now do so. Instead, he simply asserts that no invasion was imminent (Pet. 9, 30–31), relying largely on three district court cases arising on the East Coast at other times and in very different surroundings. Thus, he seeks to substitute his own *ipse dixit,* not only for the informed judgment of those charged with making the military determination, but also for the findings of the courts which have reviewed that determination.

At the time the exclusion order was issued, petitioner had been under investigation for some time. That investigation disclosed that petitioner criticized the war as started for the benefits of the war lords; that he said that the war could be stopped if Mankind United registrants and enrollees would bestir themselves; that Mankind United was going to strike simultaneously in several places, being in a position to stop all manufacture of war equipment and dynamite all ammunition dumps; that the bombing of Pearl Harbor was traced to the White House; and that dimouts and the rationing of oil and gas was to get people used to being dictated to (R. 332–334). It was on this evidence (which in the opinion of the Department of Justice was substantially the same evidence that was before the respondent, R. 255–256) that petitioner was convicted by a jury of conspiracy to

commit sedition. Certainly respondent had sufficient evidence before him to conclude that, in the light of the facts then known to him, the exclusion of the petitioner from the Pacific Coast zones was a proper precautionary measure to take to lessen the risk of espionage and sabotage.

Petitioner does not challenge the correctness of the *Hirabayashi* and *Korematsu* decisions (Pet. 8–9). On the contrary, he attempts to distinguish them on the ground that while they involved mass orders affecting many thousands of American citizens, the loyalty of most of whom was unassailable, it would not have been feasible there to conduct individual hearings; while here there was only one individual involved and that no adequate reason existed for failing to accord him a hearing conforming to all the requirements of a quasi-judicial proceeding (Pet. 9). We submit, however, that those cases are *a fortiori* ones. There loyal citizens were excluded without any hearings; here petitioner, whose disloyalty had been established by the verdict of a jury, was accorded a hearing pursuant to a procedure specifically approved by the Secretary of War (R. 228),[10] an individual exclusion order was issued whose effective date was stayed until its validity had been judicially determined in the injunction case with a holding that it was "legally and constitutionally

[10] The petition (see Pet. 35–36) fails to refer to such approval by the Secretary of War.

valid both from the standpoint of substance and procedure" (R. 282), and its enforcement was not undertaken by respondent until his action had been first expressly approved by the Chief of Staff, the Assistant Secretary of War, and the Secretary of War (R. 265–266.)[11]

Moreover, the question of the exclusion order's

[11] A good deal of the petition is taken up with an attack on the procedure established for the conduct of the exclusion hearings (Pet. 9, 11, 16–20), with assertions that the information against petitioner was not disclosed to him (Pet. 12, 18), and with contentions that respondent's determinations were at no time subject to judicial review (Pet. 10, 31, 32, 33, 36). Petitioner's statements overlook the indisputable facts that he has in two proceedings obtained very exacting and careful judicial review of the reasonableness of respondent's determination (see particularly, Finding XVIII, R. 276–277); they ignore the circumstance that in the injunction case he himself did not contradict the contents of the administrative (i. e., military) file regarding his activities (R. 256); and they are silent as to the findings by the district court in the injunction case that he was apprised of the information against him, other than data as to the sources of such information (R. 276–277), that this limited non-disclosure was justified by public policy (R. 278), and that the exclusion procedure was appropriate to protect the industries, installations, and resources located in Military Areas Nos. 1 and 2 of the Western Defense Command (R. 279). The petition is equally silent as to the holdings in the injunction case that the exclusion procedure was reasonably adapted to the carrying out of respondent's duties and responsibilities (R. 281), and that the non-disclosure of data with respect to the identity of sources of information "was proper, as disclosure would have been harmful to the interests of the United States" (R. 282).

validity has become *res judicata*.[12] In the injunction case the question of the order's validity was placed in issue between the parties hereto and the court found, as a conclusion of law, that the order was valid (R. 281–282). Petitioner appealed and the appeal was later dismissed pursuant to a stipulation that it was "without prejudice to any new or further proceedings arising out of appellant's expulsion from the State of California as involved herein" (R. 289). The appeal was dismissed, not because it was moot but because the parties had stipulated for a dismissal. The order remained in effect. Moreover, while the question of injunctive relief was moot, the question of the validity of the exclusion order was not moot, at least to the extent that petitioner may have desired to rest an action for wrongful removal upon the invalidity of the exclusion order. In such circumstances, petitioner had a right to an appellate review, as otherwise the judgment would be *res judicata*. *Electric Fittings Co.* v. *Thomas & Betts Co.*, 307 U. S. 241; *Oliver-Sherwood Co.* v. *Patterson-Ballagh Corp.*, 95 F. 2d 70, 71 (C. C. A. 9); certiorari denied, 304 U. S. 573. Cf. *Chicot County District* v. *Baxter State Bank*, 308 U. S. 371; *United States* v. *Moser*, 266 U. S. 236, 241–242; Scott, *Collateral Estoppel By Judgment*, 56

[12] The District Court so held (R. 298–299). The Circuit Court of Appeals did not find it necessary to pass upon this question, as it made an independent determination *de novo* that the exclusion order was valid (R. 338).

Harv. L. Rev. 1. The failure of petitioner to prosecute its appeal in this respect precludes it from again litigating the same question, which has been decided adversely to it.

3. *Respondent is not liable for damages.*—Even assuming, *arguendo,* the invalidity of the order or of the method of its enforcement, respondent cannot be held personally liable in the circumstances of this case. Both by Executive Order and by statute, he had been authorized and directed to take every possible precaution against espionage and against sabotage. It was stated in the Executive Order that the right of any and all persons to enter, remain in, or leave any prescribed military area "shall be subject to whatever restrictions * * * the appropriate Military Commander may enforce in his discretion" (R. 218). The Executive Order further authorized and directed the Military Commander "to take such other steps as he * * * may deem advisable to enforce compliance with the restrictions * * * including the use of Federal troops" (R. 219). Respondent's removal of petitioner through the use of military personnel was specifically and expressly authorized by Secretary of War Stimson, by Assistant Secretary of War McCloy, and by General Marshall (R. 265–266). Moreover, he had been advised both by the Attorney General of the United States and by the Judge Advocate General of the Army

that he could lawfully exercise such power (R. 248, 254). Respondent did not remove petitioner from California to Nevada until petitioner had prosecuted his injunction proceeding in the district court, seeking to enjoin respondent from "directly or indirectly by any means, method or device whatsoever from executing or causing to be executed" the exclusion order here in question (R. 247). The right to use military personnel in carrying out the order had been asserted before the court in the injunction proceeding (R. 256–257). Not until the district court had denied petitioner's suit for an injunction and had given judgment for respondent did the latter proceed to enforcement. Furthermore, as the district court in the present case concluded, respondent "acted in good faith and with the highest motives, and with an honest belief that Executive Order 9066 and Law 503 empowered him to lawfully do and direct" the acts and things for which it is here attempted to hold him liable (R. 299–300).

Similar findings of good faith and reasonableness were made by the district court in the injunction case (R. 278–279, 281–282) and by the circuit court of appeals here (R. 337–338).[18]

[18] In view of those findings, and in the face of other findings that the action here was taken pursuant to legal advice and after express approval by General DeWitt's military and civil superiors (*supra*, pp. 7, 11–12), the statement in the petition (Pet. 31) that "respondent was chiefly interested in an

Accordingly even assuming respondent's lack of authority to remove, we submit that the action taken by him had "more or less connection with the general matters committed by law to his control or supervision" and was not "palpably beyond his authority." *Spalding* v. *Vilas,* 161 U. S. 483, 498. In such circumstances, the law is clear that officials vested with wide power and discretion are, like members of the judiciary, not personally liable either for acts in excess of their jurisdiction or for erroneous ones. *Spalding* v. *Vilas, supra; Jones* v. *Kennedy,* 121 F. 2d 40 (App. D. C.), certiorari denied, 314 U. S. 665; *Cooper* v. *O'Conner,* 99 F. 2d 135 (App. D. C.), certiorari denied, 305 U. S. 643; rehearing denied, 305 U. S. 673, 307 U. S. 651. Cf. *Bradley* v. *Fisher,* 13 Wall. 335, 351–352; *O'Reilly de Camara* v. *Brooks,* 209 U. S. 45, 52.

Where, as here, the issue of necessity has been found in the officer's favor, he cannot be held in damages through the operation of hindsight. *Mitchell* v. *Harmony,* 13 How. 115, 135. And where, as here, every step is taken with the sanction of the officer's superiors, the case is analogous to those decisions which hold that a soldier is not liable in damages if he obeys an order fair on its face. Cf. *Despan* v. *Olney,* 1 Curt, 306,

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assertion of the breadth of military power, rather than in a fear of harm to the country by petitioner" is of course wholly unwarranted.

Fed. Case No. 3822 (C. C. D. R. I., *per* Curtis, J); *United States* v. *Clark*, 31 Fed. 710 (C. C. E. D. Mich.); *In re Fair*, 100 Fed. 149 (C. C. D. Neb.).

CONCLUSION

The case is unique and turns on a question of fact. The principles enunciated below accord with controlling decisions of this Court. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
PEYTON FORD,
Assistant Attorney General.
FREDERICK BERNAYS WIENER,
Special Assistant to the Attorney General.
PAUL A. SWEENEY,
RAY B. HOUSTON.
Attorneys.

AUGUST 1947.

APPENDIX

Public Law 503, Act of March 21, 1942, c. 191, 56 Stat. 173, 18 U. S. C., Supp. V, 97a, provides as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense.

Executive Order No. 9066, dated February 19, 1942, 7 Fed. Reg. 1407, provides as follows:

> AUTHORIZING THE SECRETARY OF WAR TO PRESCRIBE MILITARY AREAS
>
> Whereas the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense

premises, and national-defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655 (U. S. C., Title 50, Sec. 104):

Now therefore, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. The Secretary of War is hereby authorized to provide for residents of any such area who are excluded therefrom, such transportation, food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary of War or the said Military Commander, and until other arrangements are made, to accomplish the purpose of this order. The designation of military areas in any region or locality shall supersede designations of prohibited and restricted areas by the Attorney General under the Proclamations of December 7 and 8, 1941, and shall supersede the responsibility and authority of the Attorney General under the said Proclamations in respect of such prohibited and restricted areas.

I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area hereinabove authorized to be designated, including the use of Federal troops and other Federal Agencies, with authority to accept assistance of state and local agencies.

I hereby further authorize and direct all Executive Departments, independent establishments and other Federal Agencies, to assist the Secretary of War or the said Military Commanders in carrying out this Executive Order, including the furnishing of medical aid, hospitalization, food, clothing, transportation, use of land, shelter, and other supplies, equipment, utilities, facilities and services.

This order shall not be construed as modifying or limiting in any way the authority heretofore granted under Executive Order No. 8972, dated December 12, 1941, nor shall it be construed as limiting or modifying the duty and responsibility of the Federal Bureau of Investigation, with respect to the investigation of alleged acts of sabotage or the duty and responsibility of the Attorney General and the Department of Justice under the Proclamations of December 7 and 8, 1941, prescribing regulations for the conduct and control of alien enemies, except as such duty and responsibility is superseded by the designation of military areas hereunder.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
February 19, 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 162

HOMER GLEN WILCOX,

Petitioner,

vs.

LT. GEN. J. L. DEWITT,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR PETITIONER IN REPLY TO BRIEF IN OPPOSITION TO THE PETITION

A. L. WIRIN,
Counsel for Petitioner.

ARTHUR GARFIELD HAYS,
OSMOND K. FRAENKEL,
NANETTE DEMBITZ,
MARION P. AMES,
WALTER T. GELLHORN,
Of the New York Bar,
Counsel for the National Office,
American Civil Liberties Union;
RUSSELL E. PARSONS,
A. L. WIRIN,
Counsel for the Southern California Branch,
American Civil Liberties Union;
FRED OKRAND,
CHARLES A. HORSKY,
Of Counsel.

September, 1947.

INDEX

Citations

Cases:

Miscellaneous:

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Petitioner and the American Civil Liberties Union as *amicus curiae* submit this reply to the brief in opposition to the petition for certiorari, because of their belief that certain statements in respondent's brief are misleading and obfuscate the public importance of the grant of the petition.

IMPORTANCE OF INSTANT CASE AS PRECEDENT

Respondent's statement that this case is *sui generis* (Respondent's Brief, p. 14) is erroneous. In point of fact,

the case of *Zimmerman* v. *Poindexter*, No. 730, District Court for Hawaii, awaiting trial before a three-judge court, is an action for damages based on the military's expulsion of a citizen from Hawaii involving substantially the same issues as those herein. Half a dozen similar suits are pending in Hawaii. And in view of the number of other citizens subjected to individual exclusion orders, which is known to be large though the exact total remains a "military secret," the issues of the instant case affect the rights of a substantial group; there is no basis for respondent's speculation that none of its members will attempt to secure redress.

Moreover, we believe that the importance of the grant of this petition, from the standpoint of its status in relation to the administration and development of legal principles, involves a larger question than the mere prosecution of suits arising from the program under consideration in the instant case. For the issuance of individual civilian exclusion orders was a wide-spread and well-established institution, the validity of which has not heretofore been determined by the higher courts.[1] Unless judicially dis-

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[1] There is reason to believe that one cause for the lack of such determinations was the military's desire, partly perhaps because of doubts voiced by the Attorney General as to the constitutionality of the Exclusion Orders (R. 108), to prevent scrutiny and possible judicial criticism of the program by a higher court. The order against petitioner herein was revoked while an appeal to the Circuit Court was pending in an earlier suit for an injunction, thus rendering the appeal moot. (See note 8, *infra*, for further discussion of the mooting of the appeal.) In *Labedz* v. *Kramer*, 55 Fed. Supp. 25 (D. Ore. 1944) the Exclusion Order was also revoked, after a District Court decision which denied an injunction but was critical of the program. In *Alexander* v. *Emmons, et al., No. 3218, So. Dist. Cal.*, the exclusion order was revoked after the filing of a second complaint for an injunction subsequent to dismissal of a first complaint on procedural grounds (*Alexander* v. *De Witt*, 141 F. (2d) 573, C. C. A. 9th, 1944).

Schueller v. *Drum*, 51 Fed. Supp. 383 (E. D. Pa. 1943); *Scherzberg* v. *Maderia*, 57 Fed. Supp. 42 (E. D. Pa. 1944); and *Ebel* v. *Drum*, 52 Fed. Supp. 189 (D. Mass. 1943) were all decisions invalidating exclusion orders. None was appealed. An allegation that the military's handling of these three cases was merely a *bona fide* response to a changing military

approved, the existence of this institution establishes a social precedent; and here, in addition to the precedent of conduct, a legal precedent has been established in that the most authoritative opinion that has been rendered on this program is that of the Circuit Court in the instant case. Thus we believe this case warrants this Court's consideration, because the precedents here involved—the minimum procedural requirements for the issuance of orders drastically curtailing individual liberty, the minimum basis for a finding against an individual as to loyalty and for an order with the purpose and effect of suppressing the expression of opinion, the use of military force to enforce an order, the permissible scope of a delegation of legislative power—can hardly fail to be highly significant in the event of war or any serious emergency.

The precedent created by the individual exclusion program and the Circuit Court's approval of it is of even greater gravity if the powers involved in the issuance of the Order against petitioner are viewed in their totality rather than fragmentarily. For the Order was issued and enforced under the broad and all-pervasive power, alleged by the respondent to exist under Executive Order 9066

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situation is belied by the fact that the Scherzberg Exclusion Order was continued in effect though the *Schueller* decision was not appealed. The military's mooting of cases and issues by revocation of orders, and the prevention thereby of consideration of appeals by the higher courts on doubtful questions, was part of the pattern of the military control of civilians during World War II. See Memorandum of the Government in *Duncan* v. *Kahanamoku* (United States Supreme Court, No. 791, Oct. Term, 1945) which refers to the mooting of the cases of *Ex parte Lockner* (unreported), No. H. C. 295 (D. C. Hawaii); *Ex parte Seifert* (unreported) No. H. C. 296 (D. C. Hawaii) and *Zimmerman* v. *Walker*, certiorari denied as moot, 319 U. S. 744. In the *Lockner* and *Seifert* cases, internment orders were revoked while the cases were pending in the District Court, after an opinion by that District Court in the *Zimmerman* case which was highly critical of the military; and in the *Zimmerman* case the order was revoked after petition for certiorari was filed. In *Spurlock* v. *Steer*, 324 U. S. 868, the cause was also mooted by a military order issued after petition for certiorari was filed.

and Public Law 503, of a military commander to impose any restriction having any connection with the prevention of espionage and sabotage upon any individual in any region designated a "military area," and to enforce such restriction with troops. The exercise by the military of such great power, of a scope heretofore assumed only under a declaration of martial law, without such a declaration renders partially nugatory the safeguards established by this Court with respect to martial law.

Thus, the question of whether the precedents involved in this case should or should not endure seems to us to warrant this Court's attention. It is to be recalled that a decision which has been, perhaps, of greater guidance than any other in indicating both to executive officials and the courts the limitations within which to function with respect to military power over civilians, was decided subsequent to the war which gave rise to it. *Ex parte Milligan,* 4 Wall. 2.

PETITIONER'S STANDING

Respondent attempts to disparage petitioner's standing before the Court by stating that because petitioner has waived all but $100 damages "the subject of this proceeding for damages was . . . the obtaining of abstract pronouncements from the courts as to respondent's authority" which "he (petitioner) cannot have" (Resp. Brief, p. 14).

In this argument respondent apparently has attempted to derive a superficial plausibility for his position by a half-allusion to the doctrine of justiciable controversy. There is, of course, no issue in this case as to the existence of a controversy between petitioner and respondent, the issue being as to petitioner's right to redress for the injury he undoubtedly received. The life of the controversy between petitioner and respondent, which has never before been questioned, is not affected and cannot be destroyed by

petitioner's motive in seeking an adjudication of it; and respondent's intimation that there is any legal doctrine to the contrary reflects a gross misconception of judicial functions. This Court hardly sits to line the pockets of petitioners; in considering a petition, it is not concerned with the personal gain of the petitioner but with the character and importance of the questions involved. The fact that petitioner shares this approach is not an argument against the petition.

"RATIONAL BASIS" FOR ORDER

Respondent's statement that this case in its essentials turns on a question of fact (Brief, p. 15) is untrue; the case involves, and the courts below decided, important questions other than the existence of a "rational basis" for the order. And further we believe that respondent's attempt in this manner to belittle the case is particularly misguided because the issue of "rational basis," as posed in the instant case, requires this Court's consideration. For the question of the minimum basis for a conclusion as to disloyalty is not only of concern to petitioner but is a question of current and probable future importance; and we submit that the "rational basis" test was misinterpreted by the Circuit Court, both because of the circumstances which it regarded as sufficient to supply a rational basis for the Order against petitioner, and because of its uncritical reliance on biased, expurgated, and unsupported opinions as establishing the existence of these circumstances. (See Argument in Support of Petition, pp. 21-25.) [2]

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[2] As pointed out in the argument in support of the petition (p. 27), the question is also posed of whether a mere "rational basis" would in any event be sufficient to render the Exclusion Order constitutional, in view of the fact that its purpose and effect was to suppress petitioner's expression of opinion.

As to respondent's statement that a finding as to rational basis was made in "two separate litigated proceedings" (Resp. Brief, p. 15), it is to be noted that this amounts to consideration of the issue on one occasion by a District Court (in the injunction case) and on one occasion by the Circuit Court (in the instant case); thus, the issue has been passed upon by only two lower courts, and has not been reviewed to any greater extent than is customary practice.[3]

It is an interesting commentary on respondent's procedure in issuing the exclusion orders and on his failure to formulate the basis for its issuance other than that it was "dictated by military necessity," that respondent has now changed his explanation of the grounds for the order. (See discussion in Argument in Support of Petition, p. 16, of the fact that respondent's precedure was so contrived as to hamper any attack on his judgment as arbitrary.) The District Court in the injunction suit upheld the order mainly on the basis of the General's purported belief that petitioner "had engaged in a kind of leadership which might instigate others to carry on activities which would facilitate the carrying on of espionage and sabotage" (R. 264); this view was argued to, and adopted by, the Circuit Court in the instant case (R. 337-338), and was assumed by petitioner to be the purported justification for the order (Argument in Support of Petition, pp. 25-26). Now, however, the order is deemed to have been based on "respondent's conclusion that petitioner's mental attitude was such that *he*

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[3] The relevance to any legal doctrine or to the importance of the case of the circumstances that only one point has thus far been "decided adversely to General DeWitt in the entire litigation" (Resp. Brief, p. 15) and that the General has been held in the courts below to have acted in good faith (Resp. Brief, p. 15) is not apparent to petitioner. The thought seems to be that due to these circumstances respondent should be spared the hardship of further litigation regardless of the merits of petitioner's case.

might engage in either espionage or sabotage" (italics added, Resp. Brief, p. 21).

FACTS AS TO MILITARY SITUATION

Despite respondent's statement to the contrary (Brief, p. 21-22), we fully accept, and obviously are unable to controvert, the affidavits of General Marshall and others as to the military situation in the Pacific at the time of petitioner's forcible expulsion. But there is no indication in these affidavits that there was then any danger of invasion or large-scale attack, and in view of the obvious importance to the Army's case of establishing such danger, it must be deemed admitted by inference that none existed. The distinction between the conditions which in fact existed and those which might have justified the action taken against petitioner has been discussed in our Argument, p. 30, and we again urge the importance of analyzing facts rather than using general phrases such as "vulnerability of the Pacific Coast in the face of enemy capabilities" (Resp. Brief, p. 21). The question requiring consideration is: Vulnerability to what?[4]

MOOTING OF INJUNCTION SUIT AND *RES JUDICATA*

Respondent again raises the question of *res judicata* (Brief, pp. 24-26), which had been considered by the District Court but which the Circuit Court did not decide. For the reasons we discussed above as to the importance of the precedents established by the Circuit Court's decision, it would seem to us that the petition should be granted even if there were merit in the argument of *res judicata*. In

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[4] The statement from the *Korematsu* case on which respondent relies (Brief, p. 15) is clearly *dictum*, which, according to some members of the majority, was entirely irrelevant to the determination of the case.

any event, the argument, if tenable as to any of the issues in this case, is not even alleged to apply to the highly significant issue of respondent's forcible expulsion of petitioner by the use of troops. Finally, for reasons argued fully to the Circuit Court and apparently deemed persuasive by it, we believe that the argument of *res judicata* has no merit with respect to any of the issues herein and that its application in the instant case would involve a gross denial to the petitioner of his right to recourse to the courts.

Respondent's statement that the reason for dismissal of the appeal in the injunction case was not that it was moot (Brief, p. 25), seems an attempt to confuse the history of the case. Respondent filed a motion to dismiss the appeal on the ground that it was moot because of the rescission of the exclusion order against petitioner (R. 287), and because of the motion the petitioner agreed to a stipulation as to a dismissal lest petitioner be prejudiced thereby. Now, having moved to dismiss the case as moot, and having secured its dismissal, respondent uses the argument that the case was not moot after all, an argument which he may well be estopped from using.[5] We think respondent was right the first time; it is a safe assertion that no court would hear an appeal from a judgment denying an injunction, after the thing to which the injunction was to relate had ceased to exist.[6]

When an appeal from a District Court judgment is dismissed because of mootness, that judgment does not become *res judicata*. This question was decided on facts quite

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[5] This question was not discussed in the Petition because respondent has never before advanced this argument.

[6] The cases cited by respondent (Resp. Brief, p. 25) give no indication to the contrary of this almost self-evident proposition. The decision in *Electric Fittings Corp.* v. *Thomas & Betts Co.*, 307 U. S. 241, for example, is of no aid to respondent's position. That opinion relates to appellate jurisdiction to order the reformation of a decree and is explicitly stated not to pertain to jurisdiction to consider the merits.

similar to those herein in *Gelpi* v. *Tugwell*, 123 F. (2d) 377 (C. C. A. 1st, 1941). See also *Leader* v. *Apex Hosiery Co.*, 108 F. (2d) 71 (C. C. A. 3rd, 1939); *Restatement on Judgments*, Sec. 69(e) p. 317.[7]

In the instant case there are special and compelling reasons for applying this doctrine. For there is reason to believe that the exclusion order was revoked for the very purpose of mooting the appeal.[8] But, even assuming the mooting of the appeal was merely an incidental result of the revocation of the exclusion order rather than its prime purpose, the fact remains that it was due to respondent's act that petitioner was unable to exercise his right to judicial review by the higher courts of the validity of the exclusion order. The application of the principle of *res judicata* would not serve its legitimate purpose of preventing unnecessary harassment of courts and litigants, but would bar

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[7] In the *Gelpi* case a Federal employee had brought a mandamus proceeding seeking reinstatement to a public office from which she claimed to have been unlawfully removed; the writ was denied and while her appeal from this denial was still pending the question became moot by reason of the expiration of her term of office. The Circuit Court of Appeals remarked as follows (at p. 378):

> "Since the appellant, without fault on her part, is prevented from obtaining a review of the judgment below merely because, from intervening events, the appeal has become moot, the judgment will not become *res judicata* on the issues involved, in any subsequent litigation based upon a different cause of action. Appellant will be free to attack collaterally the execution order of removal . . . in a suit for salary, * * *."

[8] The notice of appeal from the District Court's denial of an injunction was filed Nov. 22, 1943 (R. 285) and reconsideration of the exclusion order was commenced in November, 1943 (R. 285). It is to be observed that the Order had stood for eleven months; that there was no provision in the procedure under which it was issued for its reconsideration after eleven months; that the appellee had been forcibly removed, allegedly because his removal was necessary, only two months before such reconsideration; and that the military situation had shown no marked change in the intervening two months. (Compare vague statement as to improvement in defense situation by Board which reconsidered Order, R. 286.) And see footnote 1, *supra*, as to the military's general conduct of litigation involving its control of civilians in World War II.

petitioner from securing the full judicial review to which he is entitled when he has succeeded in bringing an action in such form that it is beyond respondent's power to moot. From this standpoint, the issue of *res judicata* as here presented involves the issue of the availability of remedies for Government's action, and this Court's words in *Bell* v. *Hood* are apposite:

> "Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."

Furthermore, the dismissal of the injunction suit was stipulated, and ordered by the Circuit Court, to be "without prejudice to any new or further proceedings arising out of (petitioner's) expulsion" (R. 288-289); all of the issues raised in the injunction suit can, under the terms of this order, be raised herein. Compare *Vandalia R. R. Co.* v. *Schnuil*, 255 U. S. 113; *Baxter* v. *Buchholz-Hill Transportation Co.*, 227 U. S. 637; *Abraham* v. *Casey*, 179 U. S. 210; Freeman, *Judgments*, p. 1587, Section 754.[9]

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[9] The respondent notes that petitioner has not challenged the correctness of the findings made by the District Court in the injunction case (Resp. Brief, p. 3, note 2). While it is to be observed that petitioner had no opportunity to contest these findings because of the mooting of the appeal, nevertheless, since the facts are largely uncontroverted, petitioner concedes that these findings may, as a matter of sound judicial discretion, be adopted as the findings in the instant case. This course was adopted by the Circuit Court at the respondent's suggestion. Insofar as the District Court's conclusions, though labeled findings of fact, are in truth conclusions of law or of mixed law and fact—such as the conclusion that the procedure was reasonable—they are of course entitled to little weight on appeal.

Conclusion

Respondent's view that it is not appropriate for this Court to pass upon the issues in this case is erroneous, and the petition should be granted.

Respectfully submitted,

A. L. WIRIN,
Counsel for Petitioner.

ARTHUR GARFIELD HAYS,
OSMOND K. FRAENKEL,
NANETTE DEMBITZ,
MARION P. AMES,
WALTER T. GELLHORN,
Of the New York Bar,
Counsel for the National Office,
American Civil Liberties Union;
RUSSELL E. PARSONS,
A. L. WIRIN,
Counsel for the Southern California Branch,
American Civil Liberties Union;
FRED OKRAND,
CHARLES A. HORSKY,
Of Counsel.

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